Supreme Court, U.S.
FILED
(3)
No. 061137 FEB 12 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

Rashid Arraleh,

Petitioner,

v.

County of Ramsey; Terry Zurn, Individually,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Leslie L. Lienemann
Counsel of Record
Leslie L. Lienemann
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300

Counsel for Petitioner

2007 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED

I. Under Title VII of the 1964 Civil Rights Act and 42 U.S.C. Section 1981, if an employee is not hired or otherwise suffers adverse employment action as the result of the intentional discriminatory actions of employees who influenced the employment decision involved, may the employer avoid liability by showing that a different official was the ultimate decisionmaker?[1]

II. Under Title VII of the 1964 Civil Rights Act and 42 U.S.C. Section 1981, must an employee pleading hostile environment discrimination allege conduct that is both severe *and* pervasive?

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[1]This Court recently granted a writ of certiorari in the case of *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) *cert. granted* 127 S. Ct. 852 (2007).

PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rashid Arraleh respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the Eighth Circuit entered on September 7, 2006.

OPINIONS BELOW

The September 7, 2006 opinion of the Eighth Circuit, 461 F.3d 967 (8th Cir. 2006), is set forth at A-1 to A-26 of the Appendix. The November 15, 2006 order of the Eighth Circuit denying rehearing and rehearing *en banc,* which is also reported at 461 F.3d 967 (8th Cir. 2006) is set forth at A-43 of the Appendix. The November 18, 2005 Memorandum Opinion of the United States District Court, which is not reported, is set forth at A-27 to A-42 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered September 7, 2006. A timely petition for rehearing and rehearing *en banc* was denied on November 15, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.

42 U.S.C. §1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts....

STATEMENT OF THE CASE

This is a case brought under Title VII and Section 1981 by Rashid Arraleh, who worked for approximately six months for the County of Ramsey in Minnesota.[2] Arraleh is a Somalian Muslim who worked as an Employment Guidance Counselor in a provisional position. During his provisional employment, he applied for a number of permanent positions, for which he was not hired. In addition, Arraleh set forth evidence in response to the County's motion for summary judgment showing that during his employment, his co-workers and managers made derogatory comments about his national origin, race, color, skin, hair, children and work ethic, and subjected him to a level of scrutiny and criticism that created a working environment vastly more difficult than that in which his white American co-workers worked.[3]

The racially-motivated conduct cited by the Eighth Circuit included the following comments: "today your skin doesn't look as white as it normally does," "it's difficult to work with you people," "you are always late," "you people are so emotional, is your culture always like this," "the reason you people never get jobs is because you are always listening

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[2] Arraleh also brought his claims under the Minnesota Human Rights Act.
[3] *See*, Opinion of the Court of Appeals, A-6 to A-7; A-17 to A-19.

to loud music," "employers never call back you people," "I don't think you do as much work as we do," "is your hair real," "giving Rashid a job is like raising little terrorist kids," "Muslims should all be killed," calling Arraleh "Mr. Cocoa," "lazy," and "stupid."[4] One of Arraleh's co-workers testified that the level of hostility directed at Arraleh and other Muslims was so great that she avoided using Arraleh's name in order to avoid provoking a violent response.[5]

In addition, Arraleh's co-workers discriminatorily complained about him. One of Arraleh's co-workers testified that other co-workers criticized Arraleh for missing appointments or double booking, but did not criticize a white employee who made the same errors.[6] The co-worker also testified that, contrary to the assertions of the biased co-workers, Arraleh did his job well and was a favorite among clients.[7] Two other co-workers testified that missing appointments and double booking were common, weekly, occurrences among many employees, but that only Arraleh was criticized for these errors, which he made only a few times during his employment.[8]

Two of Arraleh's co-workers complained to manager Terry Zurn, who ultimately decided not to hire Arraleh permanently, that Arraleh's co-workers were treating him hostilely.[9] Zurn did nothing in response.[10] Arraleh complained to the Director of the division, Patricia Brady, that his co-workers treated him hostilely. Brady told him that black employees were expected to "leave their blackness

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[4] *See*, Opinion of the Court of Appeals, A-17 to A-18.

[5] *See*, Opinion of the Court of Appeals Dissent, A-22.

[6] *See*, Opinion of the Court of Appeals, A-5.

[7] *See*, Opinion of the Court of Appeals Dissent, A-25.

[8] *See*, Opinion of the Court of Appeals, A-5.

[9] *See*, Opinion of the Court of Appeals Dissent, A-25.

[10] *See*, Opinion of the Court of Appeals Dissent, A23 to A-25.

behind" at the County.[11]

During the six-month term of his temporary position, Arraleh applied for a number of open permanent positions within the County. Zurn refused to hire him and instead hired less qualified American individuals.[12] Arraleh asserted that he heard a county manager tell Zurn not to hire Arraleh because he would be "raising little terrorists."[13] The County defended the action by asserting that Zurn believed Arraleh was not qualified for the job because of complaints by his co-workers about his performance.[14] These complaints were made by the same co-workers who had made derogatory comments to and about him, which Arraleh and others reported to Zurn and Brady.[15]

Arraleh brought claims for discrimination and retaliation in hiring and hostile work environment discrimination based upon race and national origin. On appeal from the District Court's grant of summary judgment, the Eighth Circuit affirmed. In so doing, it concluded that there was no direct evidence of discrimination and, applying the *McDonnell-Douglas,* test held that there was no evidence of pretext.[16] The Court held that because the decision maker, Zurn, had hired Arraleh and other minorities, there was "strong evidence" that discrimination had not played a role in the decision not to hire Arraleh into a permanent decision.[17]

In dissent, Judge Heaney wrote:

A direct evidence inquiry is not limited to

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[11]*See*, Opinion of the Court of Appeals, A-11 to A-12; A-17 to 18.
[12]*See*, Brief of Appellants, pp. 11-14.
[13]*See*, Opinion of the Court of Appeals, A-7
[14]*See*, Opinion of the Court of Appeals, A-14 to A-15.
[15]*See*, Order of the District Court, A-33 to A-34.
[16]*See*, Opinion of the Court of Appeals, A-15.
[17]*See*, Opinion of the Court of Appeals, A-14 to A-15.

> those officially entrusted with decision-making responsibilities. If a reasonable factfinder can conclude that a third party was closely involved in the decision-making process, then the analysis can extend to those who unofficially influence the decision-making process. *Mohr v. Dusrol, Inc.*, 306 F.3d 636, 641-42 (8th Cir. 2002), *overruled on other grounds in Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)....
>
> As a contract employee, Arraleh's unofficial superiors were his permanent coworkers. Their exacting scrutiny and constant complaints regarding Arraleh led ultimately to the decision not to hire him. As Novak and Waldhauser attested, these complaints appeared motivated by discriminatory animus toward Arraleh .... For the purpose of summary judgment review, the involvement of Arraleh's coworkers in the decision-making process and their alleged comments about blacks and Muslims sufficiently establish a specific link between the decision not to hire and the alleged discriminatory animus.

Dissent (Heaney, J.).[18]

The Eighth Circuit also affirmed dismissal of Arraleh's hostile environment claim, finding that the harassment was not "severe *and* pervasive."

Arraleh petitioned the Eighth Circuit for *en banc* review. The petition was denied, with Judges Murphy and

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[18] *See,* Opinion of the Court of Appeals Dissent, A-24 to A-25.

Bye voting to accept review.[19]

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING WHETHER TITLE VII AND SECTION 1981 LIABILITY ATTACHES TO ACTIONS BY AN EMPLOYER THAT ARE INFLUENCED BY DISCRIMINATORY ACTIONS OF LOWER-LEVEL EMPLOYEES

This case presents a mature and clearly recognized inter-circuit conflict regarding enforcement of federal employment discrimination statutes.[20] In today's workplace, personnel decisions, particularly decisions to fire or hire a worker, often involve several supervisory employees and may involve input from non-supervisory personnel. Higher level managers who may make the ultimate decision depend heavily on lower level employees for information about an employee, and for recommendations as to what action should be taken relating to that employee.

This Court recently granted a writ of certiorari in the case of *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) *cert. granted* 127 S. Ct. 852 (2007). *BCI* raises the question of whether an employer can be held liable for discrimination when a "biased subordinate's discriminatory reports, recommendation, or other action caused the adverse employment action." *BCI*, 450 F.3d at 487.

The question arises in this case because the basis for the Eighth Circuit's rejection of Arraleh's claim was that the

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[19]A-43.

[20]This case arises under Title VII of the Civil Rights Act of 1964 and also under 42 U.S.C. §1981.

ultimate decisionmaker had hired Arraleh into his initial temporary position and had hired a number of minorities.[21] This analysis ignores the facts showing that the decisionmaker was substantially influenced by the complaints of Arraleh's co-workers and supervisor, who had made biased remarks and complaints about Arraleh. If Title VII provides a basis for liability when biased lower level employees influenced or caused an employment decision, then the opinion of the Eighth Circuit in this case is legally flawed.

A. Split Among The Circuits

Other Circuit Courts of Appeal have applied different standards for employer liability for biased actions of non-decisionmakers.

1. Fourth Circuit Rule

The Fourth Circuit has adopted the most narrow view, in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004). In *Hill,* the Fourth Circuit held that Title VII liability will only lie when the ultimate decisionmaker personally acted with discriminatory motive, regardless of whether his or her conduct was influenced by another illegally motivated employee. *See Hill*, 354 F.3d at 291.

The Fourth Circuit looked to the case of *Reeves v. Sanderson*, 530 U.S. 133 (2000) for guidance on the question, noting that this Court in *Reeves* held that an employer was not entitled to judgment as a matter of law because the plaintiff had shown that the discriminatory manager was "principally responsible" for the termination decision. *See Hill,* 354 F.3d at 288. The Fourth Circuit read *Reeves* to mean that the person allegedly acting pursuant to a discriminatory animus need not be the "formal decisionmaker" in order to hold the

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[21] *See*, Opinion of the Court of Appeals, A-15.

employer liable, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one "principally responsible" for or the "actual decisionmaker" behind the action. *See, Hill*, 354 F.3d at 288-89. The Fourth Circuit specifically declined to impose liability for decisions of a discriminatory agent who was not the formal or actual decisionmaker, even if that agent had "substantial influence" or "played a role, even a significant one" in the adverse employment decision. *Hill*, 354 F.3d at 291.

2. Tenth And Seventh Circuits Reject *Hill*

The narrow holding of the Fourth Circuit in *Hill* has been expressly rejected in both the Tenth and the Seventh Circuits.

The Tenth Circuit, in the case now under review by this Court, limited liability to cases in which the biased subordinate's discriminatory reports, recommendation, or other actions *caused* the adverse employment action. *See BCI*, 450 F.3d at 487. This holding rejected both the narrow view of the Fourth Circuit, as well as the less stringent rule applied by other circuits which would impose liability when biased actions *influenced* the adverse employment action.

In so doing, the Tenth Circuit recognized that a failure imposed liability for subordinate bias "forecloses a strategic option for employer who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations." *BCI*, 450 F.3d at 486 (citation omitted). It rejected, however, the rule in those circuits which would hold an employer liable when biased subordinate employees provided factual information or other input which may have affected an employment decision, reasoning that this standard would eliminate the requirement

of causation. *Id.*

The Seventh Circuit has also rejected the analysis in *Hill*, even though *Hill* purportedly rested its decision in part on the Seventh Circuit decision in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). In *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004), the Court disagreed with *Hill's* interpretation of *Shager*:

> We are mindful that *Hill* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision in *Shager*. . . . The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation. If [the higher ranking official] would not have turned down Lust for the promotion had it not been for [the lower ranking official's] recommendation, a recommendation that the jury could reasonably find was motivated by sexist attitudes, then [the lower ranking official's] sexism was a cause of Lust's injury, whether or not [the higher ranking official] could reasonably be though a mere cat's paw.

Lust, 383 F.3d at 584.

After rejecting the standard articulated in *Hill*, the

Seventh Circuit reaffirmed the standard it had articulated in its earlier cases, holding that the prejudices of an employee are imputed to the employee who has formal authority over plaintiff's job, if by concealing relevant information or feeding false information to the decisionmaker, the discriminating employee is able to influence the decision. *See Lust v. Sealy*, 383 F.3d 572, 584-585, (7th Cir. 2004) *citing Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 754 (7th Cir. 2000); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997).

3. The "Influence" Rule

A number of jurisdictions have held that liability will attach when the adverse employment decision is in some way influenced by bias.

First Circuit. The First Circuit rule has been articulated in *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). There, the First Circuit held that evidence of bias on the part of employees "in a position to influence the decisionmaker" can form the basis of liability. In this case, the plaintiff alleged discriminatory comments by two managers, one described by the Court as a "key decisionmaker" and one described by the Court as someone "in a position to influence the decisionmaker." The evidence included testimony that the decisionmaker called the lower level manager to ask his opinion about the termination decision. The question arose in the context of the Court's pretext analysis, rather than in the context of a direct evidence analysis. However, the First Circuit found that these comments were not mere "stray remarks," but rather could be imputed to the employer as evidence of discriminatory animus.

Second Circuit. The Second Circuit in *Ostrowski v. Atlantic Mutual Insurance Co.*, 968 F.2d 171, 182 (2d Cir.

1992) has held that evidence of discriminatory motive on part of "any person involved in the decision making process" can form the basis of liability. The question arose in this case under the ADEA, rather than under Title VII. However, the discussion surrounded the question of whether age was a "motivating" factor in the employment decision. The Second Circuit found that "ample circumstantial evidence" that Ostrowski's manager's age-based animus substantially motivated his recommendation for probation and termination could support liability given evidence that the company followed his recommendation. *Id.* at 183.

Third Circuit. In the Third Circuit, *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001), liability can attach when "those exhibiting discriminatory animus influenced or participated in" a termination decision. In that case, the ultimate decisionmaker testified in his deposition that he had sought input from lower level employees in making the employment decision. Abramson had produced evidence of discriminatory remarks by the lower level employees who had made recommendations to the decisionmaker.

Fifth Circuit. The Fifth Circuit in *Laxton v. Gap Inc.*, 333 F.3d 572, 583 (5th Cir. 2003) held that discriminatory remarks by an immediate supervisor are sufficient to create liability if the remarks are made by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decision maker. In *Laxton*, the plaintiff informed her immediate supervisor that she was pregnant, and her supervisor made number of negative comments about the pregnancy. It was the biased supervisor who issued a first written warning given to Laxton. The employer had a "three-strikes-you're-out" policy, so the first written warning necessarily contributed to the eventual termination. In addition, the ultimate decisionmaker testified that the biased supervisor was the primary source of

information relating to the ultimate employment decision.

Sixth Circuit. The Sixth Circuit in *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995), held that the jury was entitled to consider statements made by employees who were "meaningfully involved" in the decision to terminate. In *Wells*, the employer contended that the manager who had made age-related comments did not have the authority to fire Wells. The Court found, however, that there was evidence that the manager who had made the biased comments and the Plant Controller who the employer contended was the decisionmaker worked closely together and consulted with each other on personnel decisions. In addition, the manager who had made the age comments prepared and signed the termination report.

Eighth Circuit. This case arises in the Eighth Circuit, which has imposed liability on an employer for the actions of biased non-decision makers when those actions "played a role" in the adverse employment action. *See, e.g., Jiles v. Ingram*, 944 F.2d 409, 413 (8th Cir. 1991); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057-58 (8th Cir. 1993); *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 149 (8th Cir. 1995); *Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002).

Ninth Circuit. In *Dominínguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1039-40 (9th Cir. 2005), the Ninth Circuit held that liability may be imposed when the person who exhibited discriminatory animus influenced or participated in the decisionmaking process. In this case, a manager who had made a number of discriminatory statements adverse to women was one of the managers who interviewed the plaintiff for a promotion. The employer had argued that the biased manager was not the ultimate decisionmaker and that there was no evidence that the ultimate decisionmaker knew of the discriminatory

statements. The Court held, however, that the employer could be held liable because the biased manager participated in the hiring process.

Eleventh Circuit. The Eleventh Circuit held in *McShane v. U.S. Attorney General,* 144 Fed. Appx. 779, 791 (11th Cir. 2005) that causation may be established when a decisionmaker acted in accordance with the decision of a biased non-decisionmaker without himself evaluating the employee's situation, acting essentially as a "rubber stamp" of a discriminatory decision. In this case, the Eleventh Circuit rejected the plaintiff's contention that the employer should be held liable because the lower level manager with unlawful animus had input into the termination decision. The Court found that the ultimate decisionmaker had reviewed the "totality of the circumstances," including observations of two managers in addition to those of the manager with an unlawful motive. Under these circumstances, the Court found that the plaintiff had failed to show that the manager with unlawful animus "caused" the adverse employment decision.

D.C. Circuit. The D.C. Circuit in *Griffin v. Washington Convention Center,* 142 F.3d 1308, 1312 (D.C. Cir. 1998) held that evidence of subordinate's bias is relevant where the ultimate decisionmaker is not insulated from the subordinate's influence. Here, Griffin's immediate supervisor made discriminatory comments and recommended that Griffin be fired. While a higher level manager made the decision to fire Griffin, the biased supervisor was the primary source of information regarding Griffin's job performance. The Court found that, even if others participated in the decision making process, the decisionmaker had not been insulated from the subordinate's influence, and there could, therefore, be a causal relationship between the illicit motive and the ultimate employment decision.

B. The Question Is Important

This question is one of high importance, both to employers and employees. In order to effectuate the intent of congress, Title VII and other anti-discrimination statutes must be interpreted to prohibit discrimination which has some causal effect on an employee's job. As the majority of the circuits have recognized, employment decisions may be impacted by a number of employees, both supervisory and non-supervisory. To shield employers from liability when discrimination has, in fact, been a causative factor in the employment action solely because there is one high level executive who has been designated by the employer as "the decisionmaker," would thwart the purpose of these statutes. As the Tenth Circuit noted in *BCI*, imposing liability for subordinate bias "forecloses a strategic option for employer who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations." *BCI* at 486 (citation omitted).

The facts in this case particularly highlight the importance of the question. Both the majority and the dissenting opinions acknowledge that the complaints by Arraleh's co-workers caused him not to be hired.[22] There was no dispute in the record that the co-worker complaints were made by the same employees who made biased remarks and engaged in biased harassing conduct toward Arraleh.[23] There was no dispute in the record that Arraleh and two other co-workers made the decisionmaker aware of the biased and harassing conduct of the complaining co-workers.[24] There was no dispute in the record that the decisionmaker failed to take any action after learning of the harassing conduct toward

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[22]Opinion of the Court of Appeals, A-3 to A-4; A-15; and Dissent, A-24 to A-25.

[23]Opinion of the Court of Appeals, A-3 to A-4; Dissent, A-24 to A-25.

[24] *See,* Opinion of Court of Appeals Dissent, A-21 to A-25.

Arraleh.[25] To hold that Title VII could not, as a matter of law, have been violated in these circumstances is tantamount to holding that an employer may not be held liable for discrimination even when discriminatory conduct in its workplace is open, known, ignored and is the actual and direct cause of an employment decision, so long as the employer can identify a decisionmaker who has him or herself not made specific discriminatory comments. This is the "strategic option" for employers to evade liability that the Tenth Circuit in *BCI* warned against.

The fact that every federal circuit court of appeals has grappled with the question demonstrates its importance. To allow the split among the circuits to continue would permit some employees their day in court while depriving the same from others identically situated but for location. Moreover, employers also benefit when standards for imposing liability under employment discrimination statutes are consistent across the circuit courts of appeal. This is particularly evident in the case of a multi-jurisdictional employer. Allowing this split among circuits to continue would cause multi-district employers to be held liable in some circuits under circumstances that would not create liability in others, essentially leaving the question of liability to be determined by the accident of location.

[25]Brief of Appellant, pp. 25-26.

II. THE EIGHTH CIRCUIT'S ARTICULATION OF THE STANDARD FOR LIABILITY IN HOSTILE ENVIRONMENT DISCRIMINATION CASES CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT

A. Eighth Circuit Misstates Supreme Court Standard For Hostile Environment Discrimination.

The majority opinion in this case sets forth a standard for hostile environment discrimination cases that conflicts with the standard articulated by the Supreme Court. All a plaintiff must show to establish liability in a hostile environment harassment claim is that conduct was severe *or* pervasive enough that a reasonable person would find the environment hostile. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). This Court has reiterated this standard many times. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001) *rehearing denied* 533 U.S. 912 (2001); *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998); *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 752 (1998). The Eight Circuit opinion in this case, however, articulates the standard as requiring conduct to be both "severe *and* pervasive."[26]

This narrowing of the standard is not isolated to the Eighth Circuit. Rather, this incorrect standard has been applied broadly in cases across nearly all of the courts of appeal. *See, e.g., Rivera v. Puerto Rico Aqueduct and Sewers Authority*, 331 F.3d 183, 189 (1st Cir. 2003); *Miller v. City of New York*, 177 Fed. Appx. 195, 197 (2nd Cir. 2006); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2nd Cir. 1999); *Bacone v. Philadelphia Housing Authority*, 112 Fed. Appx. 127 (3rd Cir. 2004); *Sherrod v. Philadelphia Gas Works*, 57 Fed. Appx. 68,

[26]Opinion of the Court of Appeals, A-19.

75 (3rd Cir. 2003); *Shields v. Federal Exp. Corp.*, 120 Fed. Appx., 956, 961 (4th Cir. 2005); *Harris v. Evans*, 66 Fed. Appx. 456, 467 (4th Cir. 2003); *Thompson v. General Elec. Capital Corp.*, 53 Fed. Appx. 267, 268 (2002); *King v. U.S. Postal Service*, 156 Fed. Appx. 723, 724 (5th Cir. 2005); *Hockman v. Westward Communications*, 407 F.3d 317, 326 (5th Cir. 2004); *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724, 732 (6th Cir. 2006); *Wu v. Tyson Foods, Inc.*, 189 Fed. Appx. 375, 377 (6th Cir. 2006); *Velez v. City of Chicago*, 442 F.3d 1043, 1046 (7th Cir. 2006); *Alwine v. Buzas*, 89 Fed. Appx. 196, 202 (10th Cir. 2004); *Abeyta v. Chama Valley, Ind. School Dist. No. 19*, 77 F.3d 1253 (10th Cir. 1996)(arising in an education context, but applying Title VII analysis); *Arnold v. Tuskegee Univ.*, 99 Fair Empl. Prac. Cas. 988 (11th Cir. 2006); *Head v. Home Depot, Inc.*, 210 Fed. Appx. 696 (11th Cir. 2006); *Parker v. Atlanta Newspapers Name Holding Corp.*, 98 Fair Empl. Prac. Cas. 724 (11th Cir. 2006); *Richardson v. Dougherty Co., Ga.*, 185 Fed. Appx. 785, 789 (11th Cir. 2006); *Veitch v. England*, 471 F.3d 124, 128 (D.C. Cir. 2006); *Rowland v. Walker*, 2003 WL 21803321 (D.C. Cir. July 31, 2003); *Gibson v. Office of the Architect of the Capitol*, 2003 WL 21538073 (D.C. Cir. July 2, 2003).

B. Question Is Important

The question of whether liability is created when conduct is either "severe *or* pervasive" or both "severe *and* pervasive" is too important to permit courts of appeal to be careless in the articulation and application of the standard. This Court has recognized that an "extremely serious" single incident could create a hostile environment and violate Title VII. *See, Clark County School District*, 533 U.S. at 271, *citing Faragher v. Boca Raton*, 524 U.S. at 788 (isolated incidents (*unless extremely serious*) will not amount to discriminatory changes in the terms and conditions of employment)(emphasis added).

Holding that conduct must be both severe *and* pervasive is inconsistent with the clear direction of this Court that conduct which is not pervasive might be so severe as to create a hostile environment, and, conversely, that conduct that is "not particularly severe but that is an incessant part of the workplace environment may...be pervasive enough and corrosive enough" to meet the standard. *See, Jackson v. County of Racine*, __F.3d __, 2007 WL 174681 (7th Cir. Jan. 25, 2007).

To permit the circuits to require conduct to be both severe and pervasive would constitute a narrowing of the law, and create inconsistent results. Such a holding would shield an employer from liability for singe incidents of sexual or physical assault, while holding an employer liable for lesser conduct (such as racially derogatory comments or threats) that is repeated frequently enough to be pervasive. It would also shield an employer from liability for daily conduct that, considering each incident singularly, would not be considered severe, but that might, when considering the circumstances as a whole, create a hostile environment. Either result would be inconsistent with this Court's precedent.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals. In the alternative, the Court should reserve ruling on this petition pending its ruling in *EEOC v. BCI Coca-Cola Bottling Co*, 450 F.3d 476, 487 (10th Cir. 2006), *cert. granted* 127 S. Ct. 852 (2007).

Respectfully submitted,

Leslie L. Lienemann
Culberth & Lienemann, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300
Counsel for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-4474

Rashid Arraleh,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the District of Minnesota.
County of Ramsey; Terry Zurn, Individually,		
	*	
Appellees.	*	

Submitted: June 15, 2006
Filed: September 7, 2006

Before SMITH, HEANEY, and GRUENDER, Circuit Judges.

SMITH, Circuit Judge.

Rashid Arraleh sued his former employer, the County of Ramsey ("the County"), and his former supervisor, Terry Zurn, in his individual capacity, asserting claims under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17; 42 U.S.C. § 1981; and the Minnesota Human Rights Act, Minn. Stat. § 363A.01-.41. Specifically, Arraleh alleged that the County discriminated against him on the basis of race and

national origin. He further alleged that the County retaliated against him and created a hostile work environment. The district court[1] granted summary judgment to the County and Zurn on all of Arraleh's claims. Arraleh appeals. We affirm.

I. *Background*

Workforce Solutions ("WFS") is a County program that assists people in finding gainful employment. In late 2001, WFS needed to hire an Employment Guidance Counselor ("EGC") to meet its obligations. Terry Zurn, supervisor for WFS's Displaced Worker Program, decided to hire a temporary, six-month EGC. Zurn, with approval of WFS's director, Patricia Brady, hired Rashid Arraleh. Arraleh, a black Muslim immigrant from Somalia, began working as an EGC on December 17, 2001. By state law and corresponding County personnel rules, Arraleh's temporary employment was predetermined to end no later than May 31, 2002. Arraleh accepted the position, hoping to obtain a permanent position with WFS.

To assist Arraleh in his new position, Zurn assigned Kim Kruelle, a Korean American with ten years' experience as an EGC, to mentor Arraleh. During Arraleh's six-month term, at least four of his WFS coworkers and at least two clients made complaints against him. Arraleh developed a history of double booking, missing and appearing late for client appointments, leaving the office without signing out or informing his supervisor of where he was going, and poor customer service[2]. Arraleh does not dispute his documented

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[1] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

[2] "The following are Arraleh's recorded deficiencies:

On January 7, 2002, Arraleh could not be located even though he was supposed to be with several other EGCs for client-intake meetings. In addition, during January 2002, Zurn reprimanded Arraleh twice for taking vacation without proper notice and leaving the building without signing out.

At a lunch with a dislocated worker, Arraleh said in a loud voice, "Who do I have to sleep with to get service around here?"

On March 7, 2002, Kruelle met with Arraleh to discuss a situation in which a client had arrived for a scheduled appointment only to learn that Arraleh had signed out for the day. She also wanted to discuss the importance of keeping client appointments, attending team meetings, and not double booking. Arraleh told her that she was saying these things only because he was a "little black boy." Kruelle then stopped the meeting and asked another staff member to witness the balance of the discussion because she felt Arraleh was implying that she was a racist. Arraleh then said he was "just joking."

On March 8, 2002, Arraleh was "in a panic" when a client showed up for a scheduled appointment. Arraleh said "WFS" had "another mix-up," but the schedule showed that Arraleh actually caused the scheduling error. Arraleh blamed another employee for entering the appointment incorrectly.

On March 12, 2002, at 9:00 a.m., Arraleh met an applicant for WFS services in the lobby and scheduled an appointment to meet the client at 2:00 p.m. in the afternoon. Arraleh arrived for the appointment 55 minutes late.

On March 14, 2002, Zurn met with Arraleh to assess his performance and advised Arraleh that he needed to

improve his poor customer service and poor time management, citing a recent example where Arraleh had missed a client appointment because he had also scheduled a vacation day. Zurn advised Arraleh that such repeated conduct would be grounds for dismissal in some businesses.

On April 2, 2002, Zurn spoke with Arraleh about another missed client appointment where Arraleh scheduled the appointment for April 1 and then took the day off as a flextime day. Arraleh said he had "totally forgotten" about the appointment. Zurn then counseled Arraleh about his scheduling practices.

On April 25, 2002, Arraleh wrote Kruelle two e-mails, the first of which stated:

> Tell the world how wonderful I am tell the world that you have see [sic] a deity a divine person tell the world you Kim Kruelle swears you have seen the sight of God with your own [sic] and he works with you. From the Almighty himself.

Later the same afternoon, Arraleh wrote:

> NO THE ANSWER IS I AM JESUS

On May 7, 2002, Arraleh asked employees at the WFS front desk to cancel his appointments for the day. All clients were canceled but two. When the first client arrived promptly at 10:00 a.m., Kruelle introduced herself to the client. The client responded, "He's not here again?" The client then told Kruelle that it was "apparent that Rashid was new to the job." Kruelle apologized and said that she would keep the client's file.

deficiencies; instead, he alleges that double-booking and missing appointments were common occurrences at WFS. Coworkers Donna Waldhauser, Loretta Novak, and Mary Haigh testified in support of Arraleh's claims[3].

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[3] Donna Waldhauser, an EGC, testified that she was surprised by complaints from Arraleh's coworkers that Arraleh missed appointments because she was aware of other employees, including Kruelle, who had also missed appointments. Waldhauser herself admitted to occasionally missing appointments. However, Waldhauser was unaware of any coworker complaints to supervisors about other employees missing appointments, except for those about Arraleh.

Loretta Novak, an EGC, testified that some of her coworkers criticized Arraleh for missing appointments or double-booking appointments. She stated that a white employee hired at the same time as Arraleh, Mary White, also missed appointments and double-booked, but was not subject to criticism. According to Novak, the other counselors covered for White and did not report the incidents to Zurn. Novak did meet with Zurn to discuss her concerns about the hostile way employees were treating Arraleh, but Zurn did not respond.

Also, another EGC, Mary Haigh, testified that she found it surprising that her coworkers complained that Arraleh missed appointments with clients because it was a routine occurrence in their department to miss appointments. She stated that white EGCs miss client meetings or are unable to be located during the work day as often as several times per week. These employees do not sign out when they leave the office. However, Haigh admitted that she never heard anyone complain to any supervisors about these employees missing client appointments or being absent from the office without

According to Arraleh, Zurn treated him differently than white employees. Specifically, Arraleh contends Zurn made a computer log of complaints against him but never did so for white employees. When complaints were lodged against other employees, Zurn simply spoke with the individual and made no record of the complaint. In contrast, when white employees complained about Arraleh, Zurn did not discuss the matter with him or disclose his computer log's contents.

Toward the end of Arraleh's six-month temporary employment, Zurn provided a letter of reference at Arraleh's request because Arraleh was looking for a job. In addition, Zurn informed Arraleh of an open part-time Resource Specialist position.

On May 22, 2002, Arraleh met with Brady to complain that he did not think it was fair that he was "excluded" from a department lunch party because only ham was served. During the meeting, Arraleh said he "spoke his heart out" regarding how he felt about the department. In response to his specific complaint about ham being served, Brady apologized, said that WFS "should have known better," and sent out an e-mail to the staff "to be sensitive to other people's religions."

Brady also asked Arraleh to put his other concerns about the department in writing. Arraleh did so. In his written complaint, Arraleh asserted that racism and race issues "are so fundamental in WFS that they seem almost an integral component." Specifically, Arraleh claimed to have witnessed coworkers "use words like 'those people,' those damn Muslims." In addition, he overhead coworkers say "'[y]ou people are emotional[,]' referring to people of African

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signing out.

descend [sic]." Also, Arraleh said that he "personally ha[d] been insulted, degraded, categorized as lazy and skipping work [sic]. While all along my supervisor knew where and what I was doing." He said that "[e]very time when two people of color go to lunch or talk there is imminent danger for WFS 'white' staff" because "[t]hey assume that their jobs are in jeopardy or we are up to no good." Finally, Arraleh wrote that "[w]hen we get passed over for a position or not allow[ed] to participate on a committee or interviewing panel, we should understand that there were other factors involved not our race." Arraleh thinks he gave Brady the written complaint two days after their meeting. He "presumed she was going to find out what was going on" and "guess[ed] she did."

In response to the complaint, Brady contacted Zurn and advised him that Arraleh felt that the staff was singling him out because he was black and Muslim. Zurn responded that Arraleh's situation involved sub-par client service and that Arraleh's coworkers were distancing themselves from Arraleh because of their frustration with having to pick up Arraleh's workload. Brady also contacted George Hamm, her assigned Human Resources representative, asking him to follow up on Arraleh's complaint. In turn, Hamm contacted Arraleh, advised him that the County takes discrimination seriously, and set up an appointment with Arraleh on June 3, 2002. Arraleh canceled the appointment.

After Arraleh's complaints to Brady in May 2002, coworker Michael Ellison told Arraleh that he had "cooked his own goose" and there was no way that WFS would hire him for a permanent position. In addition, Arraleh claims to have overheard a conversation in which a County Planner told Zurn that "[g]iving [Arraleh] a job is like raising terrorist kids."

The County's temporary employees may apply for available permanent positions. When a department has an opening for a permanent position, it submits a request to the County's Human Resources Department for a list of eligible applicants. These lists, generated independently by Human Resources, contain the names of the top applicants based on points awarded for application-question responses and test scores. The department seeking the lists, in this case WFS, must hire individuals appearing on these lists.

Shortly after his hiring and during Arraleh's temporary employment, WFS requested four lists of eligible applicants from Human Resources. First, on January 29, 2002, WFS received a list that did not include Arraleh's name for any of four EGC openings. WFS hired two Asian persons, a Caucasian, and a Somali to fill these positions. Each of these hires was for the "Welfare to Work" section of WFS, not Zurn's Displaced Worker program where Arraleh worked. Second, on May 13, 2002, WFS received an updated list of eligibles to fill one EGC position. Arraleh's name did not appear on this list either. Third, on May 28, 2002, WFS requested a third updated list to fill two EGC Aide positions; Arraleh's name did appear on the list for these positions. Based upon his scores, Arraleh ranked 6th out of 13 eligible candidates and was interviewed for the positions. Finally, on June 3, 2002, Human Resources supplied WFS with a fourth updated list of eligibles to fill an EGC position. Arraleh appeared on the list of eligibles and ranked second out of the four applicants. He was not interviewed for this position.

Bruce Heinz, a WFS supervisor, and Zurn interviewed Arraleh for the EGC Aide positions. Prior to interviewing Arraleh, they consulted Hamm, who advised them to follow the already-defined selection process and to interview and evaluate Arraleh in the same manner as any other candidate. Hamm advised Heinz and Zurn that the hiring process and

Arraleh's complaint were separate matters and that Hamm would follow up on the latter with Arraleh in an exit interview.

After interviewing all of the applicants for the EGC Aide positions, Heinz and Zurn recommended to Brady that she hire Sharron Gates and JoAnn Mays. Both women are African American and ranked eighth and tenth on the list, respectively. WFS awarded the EGC position to an African-American male, Walter Rhodes, who ranked fourth on the final list of eligibles.

On June 21, 2002, Zurn wrote Arraleh a rejection letter, which stated that WFS's hiring decision "was based on our determination that the education and work experience of the candidate we selected best fits the requirements of this position."

Arraleh subsequently filed a charge of discrimination with the Minnesota Department of Human Rights and the Equal Employment Opportunity Commission (EEOC). After receiving notices of his right to sue, Arraleh commenced this lawsuit, alleging that the County discriminated against him on account of his race and national origin by declining to hire him for continued employment, retaliated against him for the complaint he made to Brady and created a hostile work environment.

II. *Discussion*

Arraleh raises three arguments on appeal. First, he argues that the district court improperly granted summary judgment to WFS and Zurn on his failure to hire claim. Second, he argues that the district court erred by granting summary judgment to WFS and Zurn on his retaliation claim.

Finally, he asserts that the district court erred by summarily dismissing his hostile work environment claim.

"We review grants of summary judgment de novo."*Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 342 (8th Cir. 2006) (internal quotations and citation omitted). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (internal quotations and citations omitted).

A. *Failure to Hire*

Arraleh asserts that he provided direct evidence of discrimination, including a remark by a County Planner that hiring Arraleh was like "raising little terrorist kids" and a remark by Brady that employees should "leave their blackness behind." In addition, he maintains that the district court erred in its application of the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), by requiring him to show that he met more than the minimum objective qualifications of the positions in his prima facie case. Finally, Arraleh argues that he was objectively more qualified for the positions than the candidates hired.

"[A] plaintiff may survive the defendant's motion for summary judgment in one of two ways." *Griffith v. Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). First, the plaintiff may present direct evidence of discrimination, which "is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action." *Id.* (quoting *Thomas v. First Nat'l Bank of Wynne,* 111 F.3d 64, 66 (8th Cir. 1997)). When a plaintiff provides direct evidence of discrimination, the three-part *McDonnell Douglas* analysis is unnecessary. *Id.* "But if the

plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient proof of pretext." *Id.*

"[N]ot every prejudiced remark made at work supports an inference of illegal employment discrimination." *Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir. 1998). "We have carefully distinguished between comments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions, from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process." *Id.* (internal quotations, citations, and alteration omitted).

Here, Arraleh asserts that the County Planner's statement to Zurn that "[giving [Arraleh] a job is like raising terrorist kids" is direct evidence of discrimination. However, this remark was made by a County employee with no authority to make the hiring decision on Arraleh's application. The record does not contain evidence showing that the County Planner's comment influenced Zurn not to hire Arraleh for a permanent position. Arraleh's evidence does not show that, after hearing the County Planner's remark, Zurn failed to review Arraleh's application or consider his performance evaluations before recommending to Brady that she hire other candidates. *Fast v. S. Union Co., Inc.*, 149 F.3d 885, 891 (8th Cir. 1998) (noting that the decisionmaker, who heard discriminatory comments made by a nondecisionmaker, failed to review the plaintiffs personnel file and performance evaluations before terminating the plaintiffs employment).

As for Brady's comment to Arraleh that "black people

are expected to leave their blackness behind," Arraleh failed to provide context for this statement and show some link to his not being hired. Without more, no reasonable fact finder could, on the basis of Brady's remark, find that Zurn's hiring decision was racially motivated. At most, the comment is an ambiguous statement by a decisionmaker unrelated to the decisional process. The comment does not constitute direct evidence of discrimination.

Finding that no direct evidence of discrimination exists, we must evaluate Arraleh's claim under the *McDonnell Douglas* burden-shifting analysis. *Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003). A plaintiff establishes a prima facie case in a "failure to hire" case when he proves that (1) he is a member of a protected class; (2) he was qualified for the position for which the employer was accepting applications; (3) he was denied the position; and (4) the employer hired someone from outside the protected class. *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 702 (8th Cir. 1994).

Once the plaintiff establishes his prima facie case, the employer may rebut the prima facie case by articulating one or more legitimate, nondiscriminatory reasons for its decision. *Pope v. ESA Serv., Inc.*, 406 F.3d 1001, 1007 (8th Cir. 2005). This burden is not onerous, nor does the explanation need to be demonstrated by a preponderance of the evidence. *Floyd v. Mo. Dept. of Soc. Servs.*, 188 F.3d 932, 936 (8th Cir. 1999). If the employer presents a nondiscriminatory reason for its decision, the plaintiff is "left with 'the opportunity to demonstrate that the proffered reason is not the true reason for the employment decision.'" *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1120 (8th cir. 2006) (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

A plaintiff may establish pretext by showing "that the employer changed its explanation for why it fired the

employee . . . ." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006). However, we are mindful that "[t]here is a strong inference that discrimination was not a motivating factor if the same person hired and fired the plaintiff within a relatively short period of time." *Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362 (8th Cir. 1997); *see also Lowe v. J.B. Hunt Transp.*, 963 F.2d 173, 174-75 (8th Cir. 1992) (holding in an age discrimination case that "[i]t is simply incredible, in light of the weakness of plaintiffs evidence otherwise, that company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.").

We have previously addressed a plaintiff's argument that her employer's "discriminatory animus [was] evidenced by the fact that [her employer] hired someone less qualified than her for [the position]." *Kincaid v. City of Omaha*, 378 F.3d 799 (8th Cir. 2004). In rejecting the plaintiff's argument, we held:

> Although an employer's selection of a less qualified candidate "can support a finding that the employer's nondiscriminatory reason for the hiring was pretextual," it is the employer's role to "[i]dentify [ ] those strengths that constitute the best qualified applicant." *Duffy v. Wolle*, 123 F.3d 1026, 1037-38 (8th Cir. 1997). This is so because "the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

Id. at 805. Because the plaintiff could not show that the

employer hired a "*less* qualified applicant" as opposed to an equally qualified candidate, her claim failed. *Id.* (emphasis in original) (citing *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1311 (8th Cir. 1995) ("Although [an employee] does possess the experience and some of the other qualities essential for success in the position, this does not suffice to raise an inference that [the employer's] stated rationale for giving the position to another is pretextual."); *Pierce v. Marsh*, 859 F.2d 601, 604 (8th Cir. 1988) ("The mere existence of comparable qualifications between two applicants, one black male and one white female, alone does not raise an inference of racial discrimination.")).

We hold that even if Arraleh, contrary to the district court's determination, did establish a prima facie case of intentional discrimination, he failed to present evidence sufficient to support a finding that the County's declared reason for declining to hire him was a pretext for race and national origin discrimination. *See Hennessey v. Good Earth Tools, Inc.*, 126 F.3d 1107, 1108 (8th Cir. 1997) ("We hold that even if Hennessey, contrary to the District Court's determination, did establish a prima facie case under the ADEA and MHRA (a question we need not and do not decide), he did not present evidence sufficient to support a finding that Good Earth's declared reason for firing him was a pretext for age discrimination.").

The County and Zurn offered a legitimate, nondiscriminatory reason for not hiring Arraleh. Zurn's rejection letter to Arraleh stated that WFS's decision not to hire Arraleh "was based on our determination that the education and work experience of the candidate we selected best fits the requirements of this position." Zurn also testified in his deposition that he and Heinz recommended that Brady hire Mays because "she was the best candidate for the position." In affidavits submitted by Brady and Zurn, both

stated that they did not hire Arraleh, specifically, because of his poor performance and because he was not a "team player."

Therefore, the burden shifted back to Arraleh to prove pretext. While Arraleh argues that he established pretext by showing that the County changed its explanation for why it did not hire him, the later affidavits by Brady and Zurn do not give a different explanation but instead elaborate on the same explanation. Specifically, the testimony showed why the candidates selected had better "work experience" and better "fit the requirements for the position" than Arraleh. We note also that the same supervisor—Zurn—both hired and subsequently declined to hire Arraleh for a permanent position within a six-month time period. This fact suggests that racial and national origin discrimination were not the motivating factors behind the adverse employment action.

Arraleh argues disparate disciplinary treatment for missing and double-booking appointments. He contends white employees did the same things without being reprimanded. However, Arraleh presented no evidence that Brady or Zurn knew of such conduct and treated whites preferentially. In fact, his own witnesses admitted that they were unaware if any of the white employees' conduct alleged by Arraleh was reported to Zurn. Furthermore, the candidates actually hired for the jobs Arraleh applied for were all minorities with the exception of one white male. Several white applicants on the list of eligibles were rejected for the positions. These facts undercut Arraleh's argument that the County was engaging in discrimination on the basis of race or national origin. We decline to second-guess the employer's identification of those strengths that constitute the best-qualified applicant.

Accordingly, we hold that the district court properly granted summary judgment to the County and Zurn on

Arraleh's failure to hire claim.

B. *Retaliation*

Arraleh's second argument on appeal is that the district court erred in dismissing his claim for retaliation because it ignored settled circuit precedent that a temporal proximity of three weeks between protected conduct and the adverse employment action is sufficient to articulate a prima facie case of retaliation as a matter of law. In addition, he argues that the district court wholly ignored his evidence of pretext.

In a retaliation claim, the plaintiff establishes his prima facie case by showing that: "(1) he engaged in protected conduct by either opposing an act of discrimination made unlawful by Title VII or participating in an investigation under Title VII; (2) he suffered an adverse employment action; and (3) the adverse action was causally linked to the protected conduct." *Singletary v. Mo. Dept. of Corr.*, 423 F.3d 886, 892 (8th Cir. 2005).

We again assume, without deciding, that Arraleh has established his prima facie case of retaliation. Therefore, we address only whether Arraleh proved pretext.

"An inference of a causal connection between a charge of discrimination and [an adverse employment action] can be drawn from the timing of the two events, but in general more than a temporal connection is required to present a genuine factual issue on retaliation." *Wallace*, 442 F.3d at 1119 (internal quotations and citation omitted). Engaging in protected activity "does 'not insulate an employee from discipline for ... disrupting the workplace.'" *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 858 (8th Cir. 2005) (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999)) (alteration in original).

In the present case, a period of three weeks between Arraleh's complaint of discrimination and his failure to receive a permanent position with the County may suffice to establish causation in his prima facie case. However, temporal proximity alone is generally insufficient to prove pretext. As we previously noted, the County and Zurn presented evidence regarding Arraleh's deficiencies during his temporary employment, all of which were recorded before Arraleh ever complained of discrimination. Therefore, we hold that the district court properly granted summary judgment to the County and Zurn on Arraleh's retaliation claim.

C. *Hostile Work Environment*

Finally, Arraleh argues that, in dismissing his hostile work environment claim, the district court "wholly ignored the affidavits of Arraleh's co-workers demonstrating that some of Arraleh's co-workers were vehemently, passionately hostile toward black men, immigrants and Muslims generally, and Arraleh specifically."[4] In addition, Arraleh argues that the

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[4] From the beginning of his employment, Arraleh claims that he was subjected to intense negative scrutiny and derogatory comments from his coworkers about his race, appearance, and national origin. These comments included statements such as "today your skin doesn't look as white as it normally does," "it's difficult to work with you people," "you are always late," "you people are so emotional, is your culture always like this," "the reason you people never get jobs is because you are always listening to loud music," "employers never call back you people," "I don't think you do as much work as we do," "is your hair real," "giving Rashid a job is like raising little terrorist kids," and "Mr. Cocoa." In addition, according to Arraleh, WFS director Patricia Brady, an

district court should have considered evidence that two of his coworkers were so concerned about the hostility expressed toward Arraleh that they approached Zurn to discuss it.

To establish a hostile work environment claim, the plaintiff must establish that: (1) he is a member of a protected class; (2) he was exposed to unwelcome harassment; (3) the harassment was based on a protected characteristic of the plaintiff; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or

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African-American female, told him that "black people are expected to leave their blackness behind." When asked how these statements related to his race or national origin, Arraleh replied, "I don't know. They just felt I was lazy, I was not up to standard, and I was not as much human as they were. That is how I felt personally."

Arraleh supported his allegations with testimony from Haigh and Waldhauser. Haigh testified that she heard many negative and offensive comments about Arraleh, such as referring to Arraleh as "lazy" and "stupid," stating that Arraleh did not know what he was doing, and calling Arraleh "little" and "cute." In addition, Haigh testified to hearing a coworker say that "Muslims should all be killed" after meeting Waldhauser's husband, who is from Kuwait.

Waldhauser testified that Arraleh's coworkers made derogatory remarks both to him and about him regarding his skin, hair, and appearance. For example, she testified that a coworker called him the "beautiful one." In addition, she heard disparaging remarks about Muslims and African immigrants generally. In addition to disparaging remarks made by coworkers, Waldhauser also interpreted some coworkers' comments as suggesting that Arraleh was not working.

should have known about the harassing behavior, but failed to take proper action to alleviate it. *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005).

To demonstrate that harassment altered the terms and conditions of one's employment, the conduct alleged must be severe and pervasive, both objectively and subjectively. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998). When determining whether a work environment is hostile or abusive, we examine all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Al Zubaidy,* 406 F.3d at 1038.

Harassment standards are demanding. *Id.*"[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Id.* at 1039 (internal quotations and citations omitted) (holding that the district court properly dismissed plaintiff's hostile work environment claims because "[m]ost of [the manager's] offhand and isolated comments were wholly unrelated to each other and had a tenuous connection to race, sex, religion or national origin."). "Mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment" to support a claim of hostile work environment. *Elmandi v. Marriott Hotel Servs., Inc,* 339 F.3d 645, 653 (8th Cir. 2003) (internal quotations, alterations, and citation omitted).

Even if the plaintiff can establish that the harassment is "severe and pervasive," the plaintiff must then present evidence that the employer "knew or should have known about the harassment and failed to respond in a prompt and

effective manner." *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 801 (8th Cir. 2003). In determining whether the employer failed to take "prompt and effective remedial action to end the harassment," we consider "the amount of time between notice of the harassment and any remedial action, the options available to the employer such as employee training sessions and disciplinary action taken against the harassers, and whether or not the measures ended the harassment." *Id.* (internal quotations and citation omitted).

Here, Arraleh testified as to statements he heard various coworkers make, and two of his coworkers, Haigh and Waldhauser, testified to hearing other employees make disparaging remarks not only about Arraleh but also about Muslims and African immigrants in general. We conclude Arraleh's evidence does not meet the rigorous standards reflected in circuit precedent to support a hostile work environment claim. As in *Al-Zubaidy*, many of the alleged comments were wholly unrelated to Arraleh's race or national origin or had a tenuous connection to them. In fact, when asked what any of the comments had to do with his race or national origin, Arraleh responded that he did not know; he just felt that his coworkers thought he was lazy and "not up to standard."

Furthermore, Arraleh's claim is weakened by the absence of evidence that the comments interfered with his ability to perform his duties as an EGC. Many of the comments were not made in Arraleh's presence or made specifically about Arraleh.

Finally, even if we concluded that Arraleh satisfied the first four elements of a hostile work environment claim, he did not provide evidence that the County failed to respond to the harassment in a "prompt and effective manner." After Arraleh met with Brady to discuss his complaint of

harassment, Brady immediately contacted Hamm, the Human Resources representative, and asked him to follow up on Arraleh's complaint. Then, Hamm contacted Arraleh, advised him that the County took such issues very seriously, and set up an appointment with Arraleh to discuss the complaint. Arraleh canceled the appointment with Hamm.

Therefore, we find no error in the district court's grant of summary judgment to the County and Zurn on Arraleh's hostile work environment claim.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court in all respects[5].

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, there are material issues of fact that made summary judgment inappropriate on Rashid Arraleh's claims of hostile work environment, failure to hire, and retaliation.

Arraleh is a black Muslim immigrant from Somalia. During his six-month tenure of employment with Ramsey County, he was directly subjected to the following comments:

- "Today, your skin doesn't look as white as it normally does" (Appellant's App. at 48);

- Being referred to as "Mr. Cocoa" (*id.* at 59-61);

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[5] Because [Arraleh's] claims under the Missouri Human Rights Act are premised on the same factual bases as his [federal] claims, they must also fail." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999).

- "Is your hair for real?" (*id.* at 56);

- "It's very difficult to work with you people" (*id.* at 52);

- African-Americans are "very difficult to work with" because they are "very emotional" and "take things too personally" (*id.* at 43); and

- "[B]lack people are expected to leave their blackness behind" (*id.* at 41).

Given this litany, it is obvious that this is not a case of an isolated, backhanded comment. Rather, it was a stream of comments that reveal an office that was hostile toward Arraleh because of his race and religion. This behavior infected the entire office environment, as Arraleh's co-workers observed discriminatory actions and behavior. *See Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 190 (2nd Cir. 2001) (noting that "evidence of harassment directed at other co-workers can be relevant to an employee's own claim of hostile work environment.") Mary Haigh attested that a co-worker named Mary Michael vehemently stated, "Muslims should be killed." (Appellant's App. at 1.) In fact, Michael's comments about Arraleh, in particular, and Muslims, in general, were so volatile and angry that Haigh tried to avoid mentioning Arraleh's name and refused to discuss anything related to Muslims and the Middle East.

Waldhauser attested that she, too, heard a steady stream of disparaging comments about Muslims and African immigrants, including the statement that "Muslims should all be killed." (*Id.* at 12.) These views became personalized to the point that Arraleh was subjected to intense scrutiny by his co-workers, several of whom repeatedly called Waldhauser to

learn if Arraleh had missed or double booked appointments. This happened even though Waldhauser testified that Arraleh's immediate supervisor had herself missed numerous appointments on a project she shared with Waldhauser.

Loretta Novak, while working in another location, attested she saw similar behavior toward Arraleh. He was criticized for missing or double booking appointments, even though the same behavior from a similarly situated white employee was regularly tolerated. Even though Waldhauser and Novak worked in separate offices, they found the behavior so unacceptable that they complained to Zurn that Arraleh was facing unwarranted hostility. Moreover, Waldhauser and Novak met with Patricia Brady, WFS's director, after Arraleh's employment term finished to again complain about the discrimination he suffered.

Arraleh clearly felt he was the victim of hostility based on his race and religion when he overheard a county planner say, "[g]iving [Arraleh] a job is like raising terrorist kids," (*id.* at 66) and being directly told by a supervisor that he needed to leave his blackness at the door. Objectively, three coworkers felt strongly enough about the nature and effect of these comments that two reported it to Zurn and a third acted by refusing to mention Arraleh's name. In other words, three reasonable, objective coworkers found that these bigoted attitudes toward Arraleh were prevalent; two of those coworkers believed it resulted in Arraleh being subjected to a heightened level of job scrutiny.

In this instance, Arraleh alleges he was subjected to daily comments and actions over a relatively short period of time—six months. Arraleh also presents the testimony of coworkers who found the actions and comments directed at Arraleh equally offensive and believed that these attitudes subjected Arraleh to a stricter code of conduct than was

applied to white coworkers. I have no trouble concluding that Arraleh produced sufficient evidence to make out a submissible case on his hostile work environment claim.

The majority also fails to take into account the discriminatory impact of these attitudes on Arraleh's failure-to-hire claim. Even though Arraleh's coworkers were not his official superiors, their impact on this decision was influential. A direct evidence inquiry is not limited to those officially entrusted with decision-making responsibilities. If a reasonable fact finder can conclude that a third party was closely involved in the decision-making process, then the analysis can extend to those who unofficially influence the decision-making process. *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 641-42 (8th Cir. 2002), *overruled on other grounds in Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In *Mohr*, this court found a reasonable inference between the decision not to hire Mohr and decisions made by an intermediate supervisor who was not directly responsible for hiring or firing Mohr. The *Mohr* decision relied on the precedent that "[c]ourts [should] look beyond the moment a decision was made in order to determine whether statements or comments made by other managerial employees played a role in the ultimate decisionmaking process." *Id.* at 641 (quoting *Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002)). Even if the ultimate decision to not hire or to fire was free of discriminatory animus, this court has held that we cannot sterilize a seemingly objective decision when it is the *indirect* product of such animus. *Id.* at 641-42.

As a contract employee, Arraleh's unofficial superiors were his permanent coworkers. Their exacting scrutiny and constant complaints regarding Arraleh led ultimately to the decision not to hire him. As Novak and Waldhauser attested, these complaints appeared motivated by discriminatory

animus toward Arraleh. And it is reasonable to assume that given Haigh's testimony, any hope of working alongside his permanent coworkers was stymied by their attitudes toward blacks and Muslims. For the purpose of summary judgment review, the involvement of Arraleh's coworkers in the decision-making process and their alleged comments about blacks and Muslims sufficiently establish a specific link between the decision not to hire and the alleged discriminatory animus.

Lastly, Arraleh articulates a case for retaliation that should be presented to a jury. The majority states Arraleh failed to establish a factual question of causation. A plaintiff may use circumstantial evidence to establish a causal inference by showing a temporal proximity between the protected conduct and the adverse action. *EEOC v. Kohler Co.*, 335 F.3d 766, 773-74 (8th Cir. 2003); *see also Smith v. Allied Health Sys.*, 302 F.3d 827, 833-34 (8th Cir. 2002). Here, there were merely three weeks between Arraleh's discrimination complaint and Zurn's decision not to hire him. Inconsistent enforcement of employment standards is also relevant to the retaliation inquiry. *Kohler*, 335 F.3d at 775-76. The majority accepts Arraleh's alleged deficiencies as the true basis for Zurn's decision not to hire Arraleh. However, these deficiencies are in dispute. As noted previously, there is strong evidence showing that Arraleh was unfairly scrutinized by his fellow employees. The record reflects Zurn knew of, yet did nothing to correct, this skewed standard; when Novak and Waldhauser reported it to him, he refused to discuss it with Waldhauser, and yet Zurn never reprimanded Arraleh for this alleged behavior. Finally, Waldhauser gave a positive evaluation of Arraleh's work and noted that many of the county's clients preferred to work with Arraleh. In short, the idea that Arraleh was not permanently hired because of his poor work is, at the very least, suspect and disputed. Rather than allow the district court to be the arbiter of fact in this

instance, the material issues of fact in this claim should be decided by a jury.

For these reasons, I would reverse the grant of summary judgment and remand to the district court for further proceedings.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Rashid Arraleh,

Plaintiff,

v.

Civ. No. 03-6209 (JNE/AJB)
ORDER

County of Ramsey and
Terry Zurn, individually,

Defendants.

Leslie L. Lienemann, Esq., Culberth, Lienemann & Stratton, LLP, appeared for Plaintiff Rashid Arraleh.

Stephen P. McLaughlin, Esq., Assistant Ramsey County Attorney, appeared for Defendants County of Ramsey and Terry Zurn.

Rashid Arraleh brought this employment discrimination action against his former employer, Ramsey County (the County), and his supervisor, Terry Zurn, in his individual capacity (collectively, Defendants), asserting claims under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2000); 42 U.S.C. § 1981 (2000); and the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.41 (Supp. 2003). The case is before the Court on Defendants' motion for summary judgment. For the reasons set forth below, the Court grants the motion.[1]

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[1] Defendants also move to strike from the pleadings and exclude evidence of claims for damages on the ground that Arraleh failed to produce medical records in compliance with

I. BACKGROUND

Arraleh is a black immigrant from Somalia. In December 2001, Arraleh was hired as a temporary Employment Guidance Counselor at Workforce Solutions, a department of the County. His position was scheduled to expire on May 31, 2002. Nonetheless, Arraleh accepted the position with the hope that he would obtain a permanent position at Workforce Solutions.

At all times relevant to this litigation, the County's temporary employees were allowed to apply for permanent positions that became available and were not filled internally. When a department or program had an open permanent position, it would submit a request to the County's Human Resources Department (Human Resources) for a "list of eligibles." These lists, generated independently by Human Resources, contained the names of the top applicants based on points awarded for application-question responses and test scores. The department or program seeking the list, in this case Workforce Solutions, was required to hire individuals appearing on these lists.

During and shortly after Arraleh's tenure at Workforce Solutions, it requested four lists of eligibles from Human Resources. On January 29, 2002, Human Resources produced a list of eligibles to fill four Employment Guidance Counselor openings. Arraleh's name did not appear on the list. On May 13, 2002, Workforce Solutions received an updated list of eligibles to fill one Employment Guidance Counselor position. Again, Arraleh's name did not appear on the list. Two weeks later, on May 28, 2002, Workforce Solutions

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a prior Order of the Court. Because the Court grants Defendants' motion for summary judgment, the Court denies Defendants' motion for sanctions as moot.

requested a third updated list to fill two Employment Guidance Counselor Aide positions. This time, Arraleh's name did appear on the list; he ranked sixth out of thirteen eligible candidates. On June 17, 2002, he was interviewed by Terry Zurn and Bruce Heinz. Finally, on June 3, 2002, Human Resources supplied Workforce Solutions with a fourth updated list of eligibles for an open Employment Guidance Counselor position. Arraleh's name appeared on this list; he ranked second out of four applicants. He was not interviewed for this position.

Although Arraleh's name appeared on two lists of eligibles, he was not selected for either of the corresponding two open Employment Guidance Counselor Aide positions or the single Employment Guidance Counselor position. Instead, Workforce Solutions awarded the Employment Counselor Aide positions to two African-American women, Sharron Gates and JoAnn Mays, who ranked eighth and tenth on the third list, respectively. Workforce Solutions awarded the Employment Guidance Counselor position to an African-American male, Walter Rhodes, who ranked fourth on the final list of eligibles.

On May 31, 2002, Arraleh's temporary appointment expired and his employment at Workforce Solutions ended. Approximately two weeks before his appointment expired, he complained to the Director of Workforce Solutions, Patricia Brady, that he believed he was being discriminated against on the basis of his race and that his work environment was racially hostile. At Brady's request, Arraleh submitted a written complaint shortly thereafter. Brady communicated Arraleh's concerns to Human Resources Generalist George Hamm, who subsequently scheduled an exit interview with Arraleh to investigate Arraleh's allegations. Arraleh cancelled the meeting and did not reschedule it.

On April 7, 2003, Arraleh filed a charge of discrimination with the Minnesota Department of Human Rights and the Equal Employment Opportunity Commission (EEOC). Arraleh received his EEOC notice of right to sue on September 8, 2003, and his Minnesota Department of Human Rights notice of right to sue on October 7, 2003. He commenced this lawsuit on November 21, 2003, alleging that the County declined to hire him for continued employment on the basis of his race, national origin, and in retaliation for the complaint he made to Brady. He also alleges that he experienced a hostile work environment.

II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, Rule 56(e) requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Failure to Hire on the Basis of Race and National Origin

Arraleh first alleges that the County declined to hire him for continued employment on the basis of his race and national origin. He maintains that he has presented direct evidence of Defendants' discrimination. Direct evidence is "evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (internal quotations omitted). Under Title VII, "[a] plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury . . . ." *Id.*

Arraleh asserts that two statements made by the County's employees are direct evidence of Defendants' discriminatory attitude. First, according to Arraleh, Zurn stated that he found it difficult to work with black men. To be considered on summary judgment, evidence must be admissible. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 728 (8th Cir. 2001). Hearsay evidence not falling within an exception is not admissible. *See id.* In this case, the only evidence in the record that Zurn made the comment is Arraleh's deposition testimony that Zurn made the comment to co-worker Donna Waldhauser. Arraleh did not himself hear the comment, and Waldhauser's affidavit does not aver that Zurn made the comment. Arraleh's deposition testimony is, therefore, inadmissible hearsay. In the absence of competent evidence that the alleged statement was made, the Court disregards it.

Next, Arraleh asserts that a County Planner told Zurn that "[g]iving [Arraleh] a job is like raising terrorist kids." Arraleh has not, however, offered any evidence that this Planner was a decisionmaker with respect to Arraleh's employment at the County. Nor has he offered any evidence that Zurn or any other decisionmakers endorsed this view. Therefore, it is not direct evidence of discrimination. *See Griffith*, 387 F.3d at 736.

A plaintiff who is unable to put forth direct evidence of discrimination must create "the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis." *Id.* The first step in the *McDonnell Douglas* analysis is for the plaintiff to demonstrate a prima facie case of discrimination. 411 U.S. 792, 802 (1973). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant meets this burden, the final step is for the plaintiff to show that the proffered nondiscriminatory reason is a pretext for discrimination. *Id.* at 804-05.

1. Prima facie case

To establish a prima facie case of race or national origin discrimination, Arraleh must show that: (1) he belongs to a protected class; (2) he applied and was qualified for the position in question; (3) there was an adverse employment action; and (4) some evidence of record supports an inference of unlawful discrimination. *See id.* at 802; *Johnson v. AT & T Corp.*, 422 F.3d 756, 761 (8th Cir. 2005) (Title VII and § 1981 analysis the same). The parties agree that Arraleh, a black Somalian, is a member of a protected group and that he suffered an adverse employment action.

The parties dispute whether Arraleh was qualified for a position at Workforce Solutions. When analyzing this element of Arraleh's prima facie case, the Court does not simply examine Arraleh's ability to perform his job. *Whitley v. Peer Review Sys., Inc.*, 221 F.3d 1053, 1055 (8th Cir. 2000). "Rather, [Arraleh] must demonstrate that [he] was actually performing [his] job at a level that met [his] employer's legitimate expectations." *Id.*; *see also Miller v. Citizens Sec. Group, Inc.*, 116 F.3d 343, 346 (8th Cir. 1997). "The fact that an employee meets some expectations . . . does not mean that [he] meets the standard if [he] does not meet other significant expectations." *Calder v. TCI Cablevision of Mo., Inc.*, 298 F.3d 723, 729 (8th Cir. 2002).

Defendants have produced specific evidence that Arraleh was not meeting their legitimate expectations. The record reveals that Arraleh had a history double-booking, missing, and appearing late at client appointments; leaving the office without signing out or informing his supervisor of where he was going; and poor customer service.[2] As a result, he was the subject of at least two customer and four co-worker complaints during his six-month term, and his supervisor, Zurn, reprimanded him on several occasions. Specifically, Zurn reprimanded Arraleh twice in January 2002, for taking vacation and leaving the building without signing out. In addition, Zurn met with Arraleh on March 14, 2002, to discuss Arraleh's repeated behavior of double booking, missing, and appearing late to appointments with clients. Zurn stated that he would need to take further action if Arraleh's performance did not improve and that in some

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[2] Defendants have offered evidence that Arraleh engaged in a similar pattern of behavior at prior and subsequent jobs. Arraleh asks the court to disregard this evidence as irrelevant and untimely disclosed. The Court has not considered this evidence.

businesses Arraleh's behavior would be grounds for dismissal. Nevertheless, on April 1, 2002, Arraleh again missed a client meeting.

Arraleh admits some of these deficiencies. However, he directs the Court to evidence that double-booking and missing appointments were common at Workforce Solutions and suggests that keeping appointments was therefore not a legitimate expectation at Workforce Solutions. According to Arraleh, when an Employment Guidance Counselor double-booked or missed an appointment, other Employment Guidance Counselors generally filled in for the unavailable Guidance Counselor. He offers affidavits of co-workers, one of whom avers that Guidance Counselors did this without complaint to their supervisor, Zurn. In his case, however, Arraleh's co-workers did not fill in for him and actually complained to Zurn about his performance.

That other employees gratuitously filled in for each other, but not Arraleh, does not excuse his poor performance. By Arraleh's own account, neither Zurn nor any other decisionmaker was aware of repeated incidents of missed or double-booked appointments by other employees. Thus, Arraleh has not presented sufficient evidence to raise a genuine issue of material fact as to whether keeping appointments was one of Defendants' legitimate expectations. Instead, it undisputedly was a legitimate expectation; Arraleh failed to meet it. Arraleh has therefore failed to satisfy his prima facie case with respect to both his race and national origin discrimination claims, and the Court need not consider Defendants' remaining arguments regarding Arraleh's inability to establish a prima facie case of discrimination. Defendants are entitled to summary judgment on these claims.

2. Pretext

Even assuming Arraleh could satisfy his prima facie case, Defendants have proffered a legitimate reason for their decision not to continue Arraleh's employment. Namely, Defendants have presented evidence that the hired candidates did not have the unfavorable employment history at Workforce Solutions that Arraleh did.

Arraleh relies on the following evidence in an effort to demonstrate that Defendants' reason is a pretext for discrimination: (1) Defendants' proffered legitimate reason has changed over time and therefore lacks credibility; (2) less qualified non-Somalians were hired for the positions for which Arraleh was rejected; (3) Zurn expressed an intent to let a list of eligibles expire before filling an open position, the effect of which was to eliminate Arraleh as a candidate for the position; and (4) various County employees made offensive comments.

Arraleh first argues that Defendants' proffered reason for not selecting Arraleh has changed during the course of this dispute and therefore lacks credibility. As stated above, Defendants argue that they declined to hire Arraleh because he had an unfavorable employment history at Workforce Solutions, whereas the individuals hired for the open positions did not. Arraleh urges the Court to conclude that this reason is inconsistent with Zurn's earlier deposition testimony and his rejection letter to Arraleh, wherein Zurn stated that the reason Arraleh was not hired was because the education and work experience of the other candidates best fit the requirements of the open positions.

"While it is true that substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext, this does not mean that an

employer cannot elaborate on its proffered reason." *Rodgers v. U.S. Bank, NA.*, 417 F.3d 845, 855 (8th Cir. 2005) (internal citations and quotations omitted). Defendants have not disavowed their statement that the education and work experience of the hired candidates best fit their employment needs. Rather, they have simply elaborated on those aspects of the hired candidates' work experience that made them better qualified for the positions Arraleh sought. Defendants' reason has not changed over time.

Arraleh next argues that Defendants' proffered reason for not selecting him for the open positions lacks credibility in light of the fact that the individuals hired for the positions were not as qualified as him. Arraleh asserts that he had a better educational background, a longer and more relevant work history, and significantly greater language skills than either employee hired for the two Employment Guidance Counselor Aide positions for which he was rejected.[3] Defendants do not dispute these assertions, but proffer evidence that Arraleh was not meeting their legitimate expectations. As described above, Arraleh had a history of double-booking, missing, and appearing late to client appointments; leaving the office without signing out or informing his supervisor of where he was going; and poor customer service. The candidates hired for permanent

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[3] Although Arraleh alleges that candidates hired later for positions other than the Employment Guidance Counselor Aide positions were not minimally qualified, he offers only the bald contentions of Employment Guidance Counselors Loretta Novak and Donna Waldhauser in support of his allegations. Neither Novak nor Waldhauser have the requisite foundation to make these assertions. Furthermore, the record is undisputed that at least one of the employees subsequently hired for an open Employment Guidance Counselor position, Rhodes, appeared on the same list of eligibles as Arraleh.

positions did not have these performance problems. Defendants could legitimately prefer employees who had positive work histories without running afoul of the anti-discrimination laws. The Court does not "sit as a super-personnel department, second-guessing employment decisions." *Ottman v. City of Independence, Mo.*, 341 F.3d 751, 757-58 (8th Cir. 2003) (internal quotations omitted).

Arraleh also argues that Zurn elected to let an eligibility list upon which Arraleh appeared to expire, notwithstanding the fact that Workforce Solutions had a need for additional permanent employees. He contends that this is evidence of discriminatory motive. Arraleh's argument lacks merit for several reasons. First, it is undisputed that when Arraleh first appeared on the list of eligibles, he was interviewed. He was, in other words, given an opportunity to compete for a permanent position. He was simply not chosen. Second, assuming, as the Court must, that Zurn expressed his intent to let the eligibility list upon which Arraleh's name appeared expire, Arraleh has not offered any evidence that Zurn followed through with his expressed intent. Arraleh has not, for example, offered any evidence of what positions were allegedly open, when they were filled, or by whom they were filled. Accordingly, the Court rejects Arraleh's contention that Zurn's expressed intent is evidence of pretext.

Finally, Arraleh seeks to demonstrate that Defendants' decision not to hire him was motivated by discrimination by pointing to comments made by Workforce Solutions employees. Although Arraleh has presented evidence that his co-workers made several offensive comments to him or in his presence, he has identified only two comments regarding race or national origin made by decisionmakers. As discussed above, Arraleh alleges that Zurn stated to Waldhauser that he found it difficult to work with black men. As presented, however, this comment is inadmissible hearsay. Moreover,

Arraleh has not presented any evidence that Zurn, who hired Arraleh knowing that Arraleh was a black Somalian immigrant, had suddenly developed an aversion to black Somalians less than six months later. *Cf. Miller*, 116 F.3d at 348; *Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362-63 (8th Cir. 1997) ("There is strong inference that discrimination was not a motivating factor if the same person hired and fired the plaintiff within a relatively short period of time.").

The only other comment regarding race or national origin Arraleh alleges was made by a decisionmaker is a comment made by Brady to the effect that black people were expected to "leave their blackness behind" at the workplace. The statement was not, however, made in the context of a hiring decision. Thus, the comment, like those made by non-decisionmakers, was a stray comment in the workplace and is, therefore, not sufficient to demonstrate discriminatory motive in hiring. *See Calder*, 298 F.3d at 730. In fact, the record is undisputed that Brady approved the decision to hire Gates, Mays, and Rhodes for the positions Arraleh sought; all three of these candidates were black. Accordingly, the Court rejects Arraleh's assertion that comments made by Workforce Solutions employees demonstrate that the decision not to hire Arraleh was motivated by discrimination.

B. Hostile Environment

Next, Arraleh asserts that he was subjected to a hostile work environment. To establish a hostile work environment claim, Arraleh must demonstrate that: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) employer liability. *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005). To alter the terms and conditions of one's employment,

conduct must be severe and pervasive, both objectively and subjectively. *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 892 (8th Cir. 2005). When determining whether a work environment is hostile or abusive, a court examines all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Al-Zubaidy*, 406 F.3d at 1038. Harassment standards are demanding. *Id.* Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Id.* at 1039.

In this case, Arraleh complains that various (often unidentified) co-workers made offensive comments to and/or about him, including the following: "Today, your skin doesn't look as white as it normally does"; "It's difficult to work with you people"; "You are always late"; "You people are so emotional, is your culture always like this?"; "The reason you people never get jobs is because you are always listening to loud music"; "Employers never call back you people"; "I don't think you do as much work as we do"; "Is your hair for real?"; "Giving Rashid a job is like raising terrorist kids"; and calling Arraleh "Mr. Cocoa," "little," "cute," "the beautiful one," "lazy," and "stupid." In addition, Arraleh has presented evidence that Donna Waldhauser heard disparaging comments about Muslims and African immigrants throughout her employment at Ramsey County.

Many of the comments about which Arraleh complains, including the evidence that coworkers called him "little," "cute," and "the beautiful one," have no apparent connection to his race or national origin. Other comments, including all but one offensive comment identified by Waldhauser, were not directed at Arraleh or made in his

presence. *See Singletary*, 423 F.3d at 893. While some comments made directly to Arraleh or in his presence were offensive, Arraleh has not presented evidence that those comments were sufficiently severe or pervasive to alter the terms or conditions of his employment. *See id.* ("We have held that racial slurs alone do not render a work environment hostile as a matter of law."). Accordingly, the Court grants Defendants' motion for summary judgment on Arraleh's hostile work environment claims.

C. Retaliation

Finally, Arraleh alleges that Defendants' decision not to hire him for continued employment was done in retaliation for his complaint to Brady that he was being discriminated against based on his race and that he was experiencing a hostile work environment. Arraleh's retaliation claims are analyzed under the analysis set forth in *McDonnell Douglas*. *See Eliserio v. United Steelworkers of Am. Local 310*, 398 F.3d 1071, 1078 (8th Cir. 2005); *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 548 (Minn. 2001). To establish a prima facie case of retaliation, Arraleh must demonstrate that: (1) he engaged in statutorily-protected conduct; (2) he experienced an adverse employment action; and (3) a causal connection exists between Arraleh's protected conduct and the adverse action. *See Eliserio*, 398 F.3d at 1078-79; *Hoover*, 632 N.W.2d at 548. Defendants concede that Arraleh experienced an adverse employment action by not being hired for continued employment. They argue, however, that Arraleh has not established the remaining two elements of his prima facie case.

Defendants first argue that Arraleh did not engage in protected activity. Acknowledging that Arraleh complained to Brady approximately two weeks prior to the expiration of his employment that he was suffering a hostile work

environment, Defendants argue that Arraleh's complaint was insufficiently precise to qualify as a protected activity. The Court disagrees. Although Arraleh's written complaint to Brady lacks precision, his complaint unambiguously communicated that, in Arraleh's opinion, Defendants were fostering a racially hostile work environment. Moreover, Patricia Brady sent an e-mail to Human Resources Generalist George Hamm after her meeting with Arraleh, wherein she reported that Arraleh had complained that he was "not being given an opportunity at employment because of his color" and that he believed that "he has been treated differently [at Workforce Solutions] because of his race." Arraleh has therefore satisfied his burden of demonstrating that he engaged in protected conduct.

Next, Defendants argue that Arraleh has not come forward with any evidence tending to establish a causal connection between his protected conduct and their decision not to hire him for continued employment. Arraleh responds by offering evidence that only three weeks elapsed between the time he made his protected complaint to Brady and Defendants' decision not to hire him for the Employment Guidance Counselor Aide positions; that after Arraleh complained to Brady on May 22, Brady and Zurn requested advice from Human Resources Generalist Hamm before interviewing Arraleh; and that Brady and Zurn began a course of retaliation against a third party, Donna Waldhauser, after she participated in an interview with Defendants' counsel in connection with this case.

The record reveals that Arraleh was not meeting Defendants' performance expectations and was reprimanded accordingly on several occasions prior to the time he made his complaint to Brady. This evidence undermines Arraleh's attempt to demonstrate a causal connection. *See Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 503 (8th Cir. 2005);

Erenberg v. Methodist Hosp., 357 F.3d 787, 793 (8th Cir. 2004). In addition, Defendants continued to consider Arraleh's application for employment after becoming aware that Arraleh had lodged a complaint. Human Resources Generalist Hamm instructed Zurn and Brady that, Arraleh's complaint notwithstanding, they should treat Arraleh like any other candidate. Arraleh has not presented any evidence that Zurn or Brady disobeyed this instruction. In sum, Arraleh has failed to demonstrate a causal connection between his protected conduct and an adverse employment action. Accordingly, the Court grants Defendants' motion for summary judgment on Arraleh's retaliation claims.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendants' motion for summary judgment [Docket No. 28] is GRANTED.

2. Defendants' motion for sanctions [Docket No. 35] is DENIED AS MOOT.

3. Arraleh's Complaint [Docket No. 1] is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 18, 2005

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-4474

Rashid Arraleh,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
County of Ramsey, et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy and Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

November 15, 2006

Order Entered at the Direction of the Court:

_____

Clerk, U.S. Court of Appeals, Eighth Circuit

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.

No. 06-1137

Supreme Court, U.S.
FILED
MAR 19 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RASHID ARRALEH,

Petitioner,

v.

COUNTY OF RAMSEY; TERRY ZURN, INDIVIDUALLY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUSAN GAERTNER
Ramsey County Attorney

THOMAS E. RING
Counsel of Record
Assistant County Attorney
50 West Kellogg Blvd., Suite 560
Saint Paul, MN 55102
(651) 266-3222

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether an employer may be held liable for race and national origin discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 based on the alleged discriminatory conduct of non-management, non-supervisory subordinate employees.

II. Whether the district court and court of appeals correctly applied the standard for establishing a hostile work environment claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 461 F.3d 967. The order of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. A43) is reported at 461 F.3d 967. The memorandum opinion and order of the district court (Pet. App. A27-A42) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The petition for rehearing and rehearing *en banc* was denied on November 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

I. Factual Background

In December 2001, Rashid Arraleh applied for a temporary, six-month job with Workforce Solutions – a Ramsey County program that assists people in finding gainful employment. After interviewing two other candidates, Terry Zurn, the supervisor of Workforce Solutions' Dislocated Worker Program, hired Arraleh for the temporary position; Patricia Brady, the director of Workforce Solutions, approved this hiring decision. Arraleh began work on December 17, 2001. Under Minnesota law and county personnel rules, this six-month position would end no later than May 31, 2002. (Pet. App. A2.)

Throughout his six-month tenure at Workforce Solutions, Arraleh failed to perform the required duties of his

position. These performance deficiencies included: (1) poor customer service; (2) failing to show up for work without notice or explanation; (3) failing to keep client appointments; (4) double-booking client appointments; (5) leaving work without signing out; and (6) inappropriate workplace behavior, including saying, for example, "Who do I have to sleep with to get service around here?" during a lunch meeting with dislocated worker clients. (Pet. App. A2-A4.)

Despite these consistent failures to meet the legitimate expectations of his temporary position, Workforce Solutions fully considered Arraleh's multiple applications for permanent employment through the County's competitive civil service hiring process, which is administered by its stand-alone Human Resources Department. When Workforce Solutions sought to fill two permanent positions in May 2002, Human Resources included Arraleh among the list of eligible candidates, and he was interviewed for the positions. Zurn ultimately hired two African-American women, who had also completed temporary positions with the agency, but who did not have the performance deficiencies exhibited by Arraleh. (Pet. App. A8-A9.)

II. District Court Proceedings

Arraleh sued Ramsey County and Zurn individually (hereinafter "Defendants"), asserting claims of: (1) failure to hire based on race and national origin discrimination; (2) hostile work environment; and (3) retaliation. Defendants, after extensive discovery by both parties, moved for summary judgment on all claims.

In his brief opposing summary judgment, Arraleh individually outlined the factual basis and legal arguments supporting each of his three claims. Regarding the

hostile work environment claim, Arraleh quoted the unpublished District of Minnesota decision in *Vargas v. Northwest Area Found.*, No. Civ. 03-2490, 2004 WL 1834580, at *7 (D. Minn. Aug. 13, 2004), for the legal standard governing such claims: "To alter the terms and conditions of one's employment, conduct must be *severe and pervasive*, both objectively and subjectively." (Arraleh's Mem. Opposing Summ. J. at 23 (hereinafter "D. Minn. Br.") (emphasis added).)

Arraleh also argued that his discriminatory hiring claim should survive summary judgment based on both direct evidence of discrimination and the inference created under the *McDonnell Douglas* burden-shifting analysis. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). As direct evidence, Arraleh cited two alleged discriminatory comments: (1) a comment by Zurn that he could not work with black men; and (2) a comment by a county manager to Zurn that hiring Arraleh would be like raising little terrorists. (D. Minn. Br. at 28-29.) Arraleh also argued that his claim should survive summary judgment under the *McDonnell Douglas* analysis because Ramsey County changed the explanation for its failure to hire him, because other employees engaged in similar conduct, and because Arraleh was better qualified than the two candidates hired. (D. Minn. Br. at 29-36.)

Arraleh's discriminatory hiring argument did not refer to any comments by his non-management co-workers (these comments were referenced only in the hostile work environment section), and did not argue that Ramsey County was liable because the biased conduct of non-management employees caused an adverse employment action – in fact, Arraleh's brief failed to cite any legal

authority relating to potential employer liability for adverse employment actions caused by non-management employee bias.

The district court granted the Defendants' motion for summary judgment. Regarding the hostile work environment claim, the district court specifically found that "Arraleh has not presented evidence that those comments were sufficiently severe or pervasive to alter the terms or conditions of his employment." (Pet. App. A40.) The district court also determined that there were no triable issues related to the discriminatory hiring claim, and expressly found that an alleged comment by Brady ("black employees are expected to leave their blackness behind") and the comments of non-management employees, all of which were referenced by Arraleh in relation to his hostile work environment claim, were not probative of pretext under the *McDonnell Douglas* analysis. (Pet. App. A37-A38.) The district court did not consider whether the evidence created a triable issue of fact regarding liability based on a theory that the bias of non-management employees caused Defendants' failure to hire.

III. Court of Appeals Proceedings

Arraleh appealed the district court's entry of summary judgment on each of his claims. In relation to the hostile work environment claim, Arraleh again quoted *Vargas* for the legal standard governing such claims: "To alter the terms and conditions of one's employment, conduct must be *severe and pervasive*, both objectively and subjectively." (Arraleh's Br. on Appeal at 21 (hereinafter "Br. on Appeal") (emphasis added).)

Arraleh also challenged the district court's finding that there were no triable issues of fact on the discriminatory

hiring claim. In his Eighth Circuit brief, Arraleh again cited two comments as direct evidence of discrimination: (1) Brady's alleged comment that black employees are expected to leave their blackness behind; and (2) the county manager's alleged comment that hiring Arraleh was like raising little terrorists. (Br. on Appeal at 27.) Arraleh also argued that his objectively better qualifications, the similar performance deficiencies by other Workforce Solutions employees, and Defendants' alleged changing explanation should have prevented summary judgment on this claim. (Br. on Appeal at 28-34.) Like his argument to the district court, Arraleh's brief to the Eighth Circuit failed to present any legal argument or authority for liability premised upon a theory that bias by non-management employees caused an adverse employment action.

The Eighth Circuit affirmed the district court's entry of summary judgment on each of Arraleh's claims (Pet. App. A21). Finding that "many of the alleged comments were wholly unrelated to Arraleh's race or national origin" and no evidence suggested that the comments interfered with his ability to perform his job duties, the court held that there was no material issue of fact on the hostile work environment claim (Pet. App. A20). Moreover, even if Arraleh had presented evidence that the harassment affected a term or condition of employment, the court concluded that the hostile work environment claim would still fail because "he did not provide evidence that the County failed to respond to the harassment in a 'prompt and effective manner.'" (Pet. App. A20-A21).

In relation to the failure to hire claim, the court held that neither Brady nor the county manager's comments were direct evidence of discrimination because there was no evidence that these comments influenced Zurn's

decision to hire other candidates (Pet. App. A11-A12). Applying the *McDonnell Douglas* analysis, the court held that "even if Arraleh, contrary to the district court's determination, did establish a prima facie case of intentional discrimination, he failed to present evidence sufficient to support a finding that the County's declared reason for declining to hire him was pretext for race and national origin discrimination." (Pet. App. A14).

Following the Eighth Circuit's affirmance of the district court, Arraleh petitioned for rehearing *en banc* and raised, for the first time in these proceedings, the issues presently petitioned for review. On November 16, 2006, the Eighth Circuit denied Arraleh's petition for rehearing *en banc* (Pet. App. A43).

ARGUMENT

I. Arraleh Waived the Issue of Employer Liability for Adverse Employment Actions Influenced or Caused by the Discriminatory Conduct of Non-Management Employees.

Arraleh asks this Court to review whether an employer may be liable for adverse employment actions caused by the discriminatory animus of non-management employees – an issue upon which this Court has already granted a writ of certiorari. *See BCI Coca-Cola Bottling Co. v. EEOC*, ___ U.S. ___, 127 S. Ct. 852 (2007). This issue was first raised in Arraleh's petition for rehearing *en banc* – it was not presented to either the district court or the Eighth Circuit. As a court of review, this Court has consistently refused to consider, absent extraordinary circumstances, issues not presented to and passed upon by

the lower courts. *E.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989); *Duignan v. U.S.*, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L.Ed. 996 (1927). Because Arraleh failed to present to the lower courts both the legal authority and the factual arguments for employer liability for hiring discrimination influenced or caused by the biased conduct of non-management employees, and because this case does not present extraordinary circumstances to excuse waiver, Supreme Court review of this issue is not warranted.

A. Arraleh Did Not Argue that Biased Conduct by Non-Management Employees Influenced the Defendants' Hiring Decisions.

In his Petition for a Writ of Certiorari, Arraleh asserts that the Eighth Circuit's opinion is "legally flawed" because Title VII creates employer liability when "biased lower level employees influenced or caused an employment decision." (Pet. 7.) As the petition correctly states, the circuits are split on whether, and under what circumstances, such liability is formed. (Pet. 7-13.) In discussing the Eighth Circuit's standard on this point of law, Arraleh cites four cases: (1) *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991); (2) *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993); (3) *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147 (8th Cir. 1995); and (4) *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002). (Pet. 12.) However, none of these cases, and no other authority applying this legal standard, were cited in Arraleh's briefs on summary judgment or on appeal.

In his brief to the district court, Arraleh argued that both Zurn and the county manager's comments constituted

direct evidence of discrimination. Arraleh also argued that the Defendants' changed explanation and his superior qualifications were sufficient to show that the Defendants' explanation was pretextual under the *McDonnell Douglas* analysis. In addition to rejecting each of these factual arguments, the district court considered and rejected two factual arguments not raised by Arraleh under his discriminatory hiring claim, finding that Brady's alleged comment and the comments of non-management employees did not show pretext.

Apparently based on the district court's analysis, Arraleh adjusted his arguments in his brief to the Eighth Circuit. He substituted the alleged comment by Brady, which the district court had raised *sua sponte*, for the alleged comment by Zurn, which the district court found was inadmissible hearsay. Arraleh again decided that the comments by non-management employees – the second facts raised *sua sponte* by the district court – did not warrant inclusion in his discriminatory hiring claim.

The opinion of the Eighth Circuit considered and rejected each of the arguments actually presented by Arraleh. The court specifically found that the record: (1) does not contain evidence that the county manager's alleged comment influenced Zurn's decision (Pet. App. A11); (2) does not provide context linking Brady's comment to the hiring decision (Pet. App. A11-A12); (3) does not suggest that the Workforce Solutions decisionmakers knew of the alleged performance deficiencies of other employees (Pet. App. A15); and (4) suggests that Defendants merely elaborated on, rather than changed, their explanation for the hiring decision (Pet. App. A15). Although Judge Heaney, writing in dissent, suggested that the biased comments by non-management employees provided sufficient direct evidence of discrimination to

survive summary judgment (Pet. App. A24-A25), this theory was neither pressed by Arraleh nor passed on by the majority.

Even after the district court *sua sponte* considered the conduct of non-management employees, Arraleh chose not to present to the Eighth Circuit the legal authority or factual arguments necessary to support this new theory. This issue was therefore waived and is not appropriate for Supreme Court review.

B. This Case Does Not Present Extraordinary Circumstances Sufficient to Excuse Mr. Arraleh's Waiver of this Issue.

Arraleh was hired to a temporary position, but hoped to use it as a six-month audition for a permanent position. Rather than working hard to exceed his employer's reasonable expectations, however, Arraleh performed substandard work. Not surprisingly, the employer chose to hire other individuals without this negative history.

In these proceedings, Arraleh has never denied his significant shortcomings. (Pet. App. A2, A5.) Rather, he asserted that other employees (who had already been hired to permanent positions) engaged in similar conduct, and thus ascribed his own failure to obtain a permanent position to the discriminatory animus of Zurn – the very person who had hired him only six months earlier. After twice failing in presenting this theory, Arraleh now attempts to ascribe his failure to the discriminatory conduct of his co-workers.[1] This issue, however, was waived when

[1] Arraleh's new theory of liability based on the discriminatory animus of his co-workers, rather than on the bias of Zurn, directly contradicts his claim against Zurn individually.

Arraleh failed to present the legal or factual support for this theory of liability to the lower courts.

In this petition, Arraleh correctly notes that the issue presented – whether, and under what circumstances, an employer may be liable for adverse employment actions influenced or caused by the bias of non-management employees – is an important legal question upon which the circuits are split. This question, however, can be adequately considered and resolved in the case in which this Court has already granted a writ of certiorari. Thus, it is unnecessary for this Court to review the present case – one in which neither the legal nor factual arguments were previously presented or developed – in order to resolve this important legal question.

Supreme Court review is intended to review the lower courts' analysis for legal errors; it is not intended to provide litigants an opportunity to present new theories and legal arguments. Arraleh has not presented any explanation for his failure to present this issue to the lower courts or extraordinary circumstances sufficient to excuse this waiver. Accordingly, Defendants respectfully request that this Court deny Arraleh's Petition for a Writ of Certiorari.

II. The Lower Courts Correctly Applied the Legal Standards Governing Hostile Work Environment Claims.

Under Eighth Circuit precedent, which Arraleh does not challenge in this petition, a plaintiff must establish five elements for a hostile work environment claim: "(1) he is a member of a protected class; (2) he was exposed to unwelcome harassment; (3) the harassment was based on

a protected characteristic of the plaintiff; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassing behavior, but failed to take proper action to alleviate it." (Pet. App. A18-A19 (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)).) In analyzing the fourth element of this claim – that the harassment affected a term, condition, or privilege of employment – Arraleh argues that the "severe and pervasive" standard articulated in this case, and in some other Eighth Circuit cases, conflicts with Supreme Court precedent establishing a "severe or pervasive" standard. (Pet. 16-17.)

This argument selectively removes a single phrase from the context in which it was applied, wholly ignoring the comprehensive legal analysis performed by the lower court. When this analysis is actually examined, it is clear the Eighth Circuit correctly applied the proper legal standard to the facts of this case. Moreover, even if the wrong standard was applied in analyzing the fourth element, the Eighth Circuit held that Arraleh also failed to present sufficient evidence under the fifth element – that the employer knew of, and failed to adequately respond to, the harassment. Therefore, Supreme Court review of this issue is not warranted.

A. Any Misstatement of the Hostile Work Environment Standard Is Inconsequential Because the Lower Courts Applied the Proper Legal Analysis.

In *Harris v. Forklift Sys., Inc.*, this Court held that discriminatory conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment"

violates Title VII. 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In applying this standard, a court must examine the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Arraleh correctly states that, in analyzing whether the evidence in this case was sufficient to establish a triable issue of fact on his hostile work environment claim, the Eighth Circuit stated that conduct "must be severe and pervasive, both objectively and subjectively."[2] (Pet. App. A19.) The present Petition, however, completely ignores the very next sentence of the Eighth Circuit's opinion, in which the court restated – word-for-word – the totality of the circumstances analysis enunciated by this Court in *Harris*. In concluding that Arraleh failed to provide sufficient evidence to survive summary judgment, the Eighth Circuit analyzed many of these factors – finding that the evidence in the record suggests that many of the alleged comments were unrelated to Arraleh's race or national origin, that many of the comments were not made around or about Arraleh, and that the comments did not interfere with his job performance.

Thus, even if the Eighth Circuit – like Arraleh in his briefs to the lower courts – misstated the overarching standard, the legal analysis actually applied by the court

[2] In both his briefs to the district court and to the Eighth Circuit, Arraleh quoted the very same "severe and pervasive" standard that he now argues is in need of Supreme Court review to correct.

properly considered the totality of the circumstances as required by this Court's precedent.

B. Even if the Lower Courts Improperly Required Conduct Be "Severe and Pervasive," a Writ of Certiorari Is Inappropriate Because the Eighth Circuit Also Found for Defendants on Alternative Grounds.

Beyond holding that Arraleh failed to present evidence that the conduct in this case affected a term, condition, or privilege of his employment, the Eighth Circuit held that Arraleh also "did not provide evidence that the County failed to respond to the harassment in a 'prompt and effective manner.'" (Pet. App. A20-A21.) Arraleh does not seek review of this alternative holding in this Petition. Thus, even if this Court were to find error in the lower courts' analysis of the "term, condition, or privilege" element of the hostile work environment claim, Defendants would remain entitled to summary judgment. Accordingly, there is no outcome-determinative controversy requiring this Court's consideration.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue in this case and the judgment of the Eighth Circuit should be affirmed without further proceedings or delay.

Respectfully submitted,

SUSAN GAERTNER
Ramsey County Attorney

THOMAS E. RING
Assistant County Attorney
50 West Kellogg Blvd.
Suite 560
Saint Paul, MN 55102
(651) 266-3222
Counsel for Respondents

Supreme Court, U.S.
FILED
MAR 29 2007
OFFICE OF THE CLERK

No. 06-1137

In the Supreme Court of the United States

Rashid Arraleh,

Petitioner,

v.

County of Ramsey; Terry Zurn, Individually,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

Leslie L. Lienemann
Counsel of Record
Leslie L. Lienemann
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300

Counsel for Petitioner

2007 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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ARGUMENT

I. Issue Of Employer Liability For Adverse Employment Actions Influenced Or Caused By Discriminatory Conduct Of Non-Management Employees Is Fairly Presented In This Case

A. Respondent Admits The Question Is Important

Respondent expressly agrees that the first question presented by the writ, whether Title VII and Section 1981 liability may be found when discriminatory conduct of non-managers influenced or caused an adverse employment action, is an important question upon which the Courts of Appeal are split.[1] It argues, however, that this important question can be adequately considered and resolved in the case in which this Court has already granted a writ of certiorari, *BCI Coca-Cola Bottling Co. v. EEOC*, __ U.S. __, 127 S. Ct. 852 (2007).[2] The *BCI* case, however, raises the question of whether discriminatory conduct of *lower level supervisors* who influence adverse employment actions can be the basis of liability. *See BCI*, 450 F.3d 476 (10th Cir. 2006). This case raises the question of whether discriminatory conduct by *non-managerial* employees who influence adverse employment actions can be the basis of liability. These questions are not identical, but they are inextricably related and bound up in the ultimate question presented by the split among the circuits, that is, to what extent will the conduct of non-decision makers be attributed to the employer for purposes of finding liability. Because the questions are intertwined, but not identical, it is important for the Court to also consider the question presented by the facts of this case.

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[1] *See, Brief For The Respondent In Opposition p. 10.*
[2] *Id.*

B. Arraleh Has Not Waived This Argument

Respondent's primary argument opposing this writ is its contention that Arraleh waived the argument in the lower courts. Respondent cites to nothing in the record that suggests that Arraleh affirmatively waived this argument, but rather argues that Arraleh did not raise it below with sufficient specificity to preserve the argument on appeal. In support of its argument, Respondent cites to the case of *Browning-Ferris Industries v, Kelco Disposal, Inc.*, 492 U.S. 257 (1989), in which this Court refused to consider an argument that the due process clause had been violated when the petitioner had never plead a violation of the due process clause and made no specific mention of it in its petition for certiorari. In the *Browning-Ferris* case, however, this Court found that there was an absence of a developed record on the issues relevant to the legal inquiry, and thus refused to consider the question as "only an enlargement" of the legal issues presented to the lower courts.

In this case, the issue was specifically raised in the petition for certiorari. More importantly, there is a fully developed record in this case of all of the facts pertaining to the legal issue of liability under Title VII and Section 1981. This case is an appeal of summary judgment, which is reviewed *de novo.* The doctrine of "clear intendment" should apply here. *See, Braniff Airways, Inc. v. Nebraska Bd. Of Equalization and Assessment*, 347 U.S. 590 (1954).[3]

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[3] Throughout its brief in opposition to the writ, Respondent misrepresents both the facts and the arguments presented by Arraleh to the district and appellate courts. Respondent's brief incorrectly states, for example, that Arraleh did not dispute Respondent's recitation of his alleged performance deficiencies. In fact, Arraleh presented evidence that some of the errors his discriminatory co-workers and managers attributed to him were blatantly false, were in fact errors committed by co-worker Donna Waldhauser, and that decision maker Zurn knew of the falsity of the allegations. *See Plaintiff's Memorandum Opposing Summary Judgment pp.6-7.*

Respondent's brief also incorrectly states that Arraleh presented no evidence that the decision makers, managers Terry Zurn and Patricia Brady, knew of the harassment of his co-workers. In fact, Arraleh

Arraleh specifically argued to both lower courts that there was direct evidence of discrimination, including the discriminatory remarks of Zurn, Brady and others.[4] The district court acknowledged Arraleh's argument that the discriminatory comments of his co-workers contributed to the discriminatory decision not to hire him. *A-35 to A-38.* While the district court rejected the argument, the court clearly "passed on the question."

Arraleh argued to both lower courts that the conduct of his co-workers was discriminatory.[5] Arraleh also argued to both lower courts that Zurn knew of the discriminatory and harassing conduct of Arraleh's co-workers, because co-workers Donna Waldhauser and Loretta Novak reported the conduct to him.[6] *Respondent* argued to both lower courts that Zurn based his employment decisions on the discriminatory complaints of Arraleh's co-workers, which Waldhauser had informed Zurn were false and harassing. For Respondent to contend that the Court cannot consider the legal ramification of its own factual arguments is disingenuous.

While the district and appellate court ignored the evidence presented by Arraleh, Arraleh presented the facts supporting this theory of liability. These facts and arguments lead to a specific dissent in the appellate panel based precisely on this theory of liability. While this theory of liability under

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presented evidence that he and two of his co-workers complained to Zurn and to Brady about the conduct. *See Plaintiff's Memorandum Opposing Summary Judgment pp. 10-11, 18.* Arraleh also submitted evidence that he informed Human Resources Manager George Hamm that he was having difficulty with his co-workers and asked Hamm if formally complaining about the conduct would negatively impact his chances of getting hired. Hamm told him making a complaint would hinder his ability to get a job with the County. *See Appellant's Reply Brief p. 5.*

[4] *Plaintiff's Memorandum Opposing Summary Judgment pp. 1-6, 11, 17, 25-26. Appellant's Brief pp.1-4, 22-23.*

[5] *Plaintiff's Memorandum Opposing Summary Judgment pp. 24-25. Appellant's Brief pp. 22-24.*

[6] *Plaintiff's Memorandum Opposing Summary Judgment pp.10-11, 18, 27. Appellant's Brief pp. 14-15, 25.*

Title VII and Section 1981 is arguably an enlargement of the direct evidence arguments presented below, the legal issue of what constitutes direct evidence of discrimination has been passed on below. Moreover, the court should take note that this issue is "in a state of evolving definition and uncertainty." *See Virginia Bankshares, Inc., v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and cases sited therein. Given the uncertain state of the law, when the Court has already agreed to entertain the legal question presented directly in the case and when the factual record below has been fully presented, the Court should accept review.

II. "Severe Or Pervasive" Standard Has Not Been Applied By The Courts Of Appeal

A. Respondent Admits The Eighth Circuit Incorrectly Articulated The Standard For Hostile Environment Discrimination

Respondent acknowledges that the Eighth Circuit has routinely articulated an incorrect standard for liability in hostile environment discrimination cases by articulating that standard to require conduct to be both "severe *and* pervasive."[7] Respondent's brief in opposition does not, however, address the incorrect use of this standard *across the circuit courts of appeal*. Respondent merely suggests that this Court should ignore the wide-spread use of an incorrect legal standard because Respondent believes that the courts correctly *apply* the standard, even though they incorrectly *articulate* the standard. Respondent rationalizes that, even though the Courts of Appeal routinely misstate the legal standard for liability set forth in *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), the Eighth Circuit correctly cited the "totality of the circumstances" analysis enunciated by this Court in *Harris*. The problem with this rationalization is obvious. The "totality of the circumstances" analysis under *Harris* is a list of factors to be used to determine whether conduct is sufficiently "severe *or*

[7] *See, Brief For The Respondent In Opposition p. 12.*

pervasive" to create a hostile environment. When Circuit Courts of Appeal apply the higher standard, the "severe *and* pervasive" standard, the "totality of the circumstances" analysis is measured against this higher standard.

B. Review Is Appropriate In This Case

Finally, Respondent argues that the Court should not accept review in this case, despite the Eighth Circuit's incorrect articulation of the legal standard in hostile environment cases, because of the Eighth Circuit's determination of the "employer response" element of the claim. Respondent cites to the Eighth Circuit's majority opinion, suggesting that Arraleh did not provide evidence that the County failed to respond to the harassment in a prompt and effective manner. As noted by the Eighth Circuit dissenting opinion, Arraleh presented evidence that he and two of his co-workers complained to managers Zurn and Brady about the discriminatory harassment directed toward him.[8] Zurn, the decision making manager, admitted that he did nothing in response.[9] The County never investigated Arraleh's allegations until after Arraleh brought suit.[10]

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[8] *Plaintiff's Memorandum Opposing Summary Judgment pp. 9-11, 14, 17-19, 26. Appellant's Brief pp. 7-9, 11, 14-16, 25.*

[9] *Plaintiff's Memorandum Opposing Summary Judgment pp 27. Appellant's Brief pp. 26, 38.*

[10] *Plaintiff's Memorandum Opposing Summary Judgment pp.17-19, 27. Appellant's Brief pp. 16, 26, 38*

CONCLUSION

The issues articulated for review in this case raise serious questions of law upon which the Circuit Courts of Appeal are not in accord, either with each other or with the precedent of this Court. The Court should grant the petition, reiterate the "severe or pervasive" standard of *Harris v. Forklift Sys. Inc.*, and answer the question of when the discriminatory conduct of non-decisionmakers is attributable to employers under Title VII and Section 1981.

Respectfully submitted,

Leslie L. Lienemann
Culberth & Lienemann, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300
Counsel for Petitioner